83-87

No.____

Office - Supreme Court, U.S.
FILED
JUL 15 1983
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,

Petitioners,

vs.

JESSE A. VAIL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THOMAS R. MILLER
MILLER, TRACY & BRAUN
LAW OFFICES, P.C.
316 S. Charter
Monticello, IL 61856

Counsel for Petitioners

KRAMER PRINTING COMPANY, Monticello, IL 61856

QUESTIONS PRESENTED

1. Whether a probationary public school teacher may ever have a property interest in continued employment protected by the Fourteenth Amendment to the Constitution of the United States, when there exists a statutory tenure system.

2. Whether the breach of a probationary public school teacher's employment contract is a Constitutional tort litigable in Federal Court under 42 U.S.C. § 1983.

TABLE OF CONTENTS

Subject Index

Pages

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ 5

Conclusion 13

Appendix Index

Exhibit A. Opinion of the United States Court of Appeals for the Seventh Circuit App.1

Exhibit B. Opinion of the United States District Court for the Central District of Illinois, Danville Division App.43

Exhibit C. Order of the United States District Court for the Central District of Illinois, Danville Division, Re: Defendants' Motion to Dismiss for Lack of Jurisdiction App.50

Exhibit D. Defendants' Motion to Dismiss for Lack of Jurisdiction App.53

Exhibit E. Amendment 14, Section 1, Constitution of the United States App.55

TABLE OF CONTENTS – Continued

Pages

42 United States Code, Section 1983 .. App.55

Illinois Revised Statutes
Chapter 122, Section 24-11 ..... App.56

Illinois Revised Statutes
Chapter 122, Section 24-12 ..... App.58

TABLE OF AUTHORITIES

Cases

Pages

Bessler v. Board of Education of Chartered School District No. 150 of Peoria County, Illinois, 43 Ill.App.3d 322, 356 N.E.2d 1253 (1976), modified 69 Ill.2d 191, 370 N.E.2d 1050 (1977) 9

Bio-Medical Laboratories, Inc. v. Trainor, 68 Ill.2d 540, 370 N.E.2d 223 (1977) 11

Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) 5

Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) 5,10

City of Chicago v. Fair Employment Practices Commission, 65 Ill.2d 108, 357 N.E.2d 1154 (1976) 11

TABLE OF AUTHORITIES – Continued

Pages

Illinois Education Association Local Community High School District 218 v. Board of Education of School District 218, Cook County, 62 Ill.2d 127, 340 N.E.2d 7 (1975) 11

Jago v. Van Curen, 454 U.S. 14, 102 S.Ct. 31, 70 L.Ed.2d 13 (1981) (*per curiam*) 5

Johnson v. Board of Education of Decatur School District No. 61, 85 Ill.2d 338, 423 N.E.2d 903 (1981) 11

Leis v. Flynt, 439 U.S. 438, 99 S.Ct.698, 58 L.Ed.2d 717, reh. den. 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979) (*per curiam*) 5

Northern Illinois Automobile Wreckers and Rebuilders Association v. Dixon, 75 Ill.2d 53, 387 N.E.2d 320 (1979), cert. den. 444 U.S. 844, 100 S.Ct. 87, 62 L.Ed.2d 57 (1979) 11

Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) 5

Ryan v. Aurora City Board of Education, 540 F.2d 222 (1976) 7

Vail v. Board of Education of Paris Union School District No. 95, No. 82-1202, Slip Op. (7th Cir., April 19, 1983) 6

TABLE OF AUTHORITIES – Continued

Pages

Constitutional Provisions and Statutes

Pages

Illinois Revised Statutes, Chapter 122, Section 10-23.8 11

Illinois Revised Statutes, Chapter 122, Section 10-23.8a 11,12

Illinois Revised Statutes, Chapter 122, Section 24-11 ..... 3,4,5, 9,10,11

Illinois Revised Statutes, Chapter 122, Section 24-12 3

United States Code, Chapter 28, Section 1254(1) 2

United States Code, Chapter 28, Section 1343(3) 2

United States Code, Chapter 42, Section 1983 ..... 2,7, 8,9

United States Constitution, Fourteenth Amendment, Section 1 55

No.____

In The

Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,

Petitioners,

vs.

JESSE A. VAIL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Board of Education of Paris Union School District No. 95, Terrance C. Parks, Charles R. Fox and Bernie Rinehart, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on April 19, 1983.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Seventh Circuit and the United States District Court for the Central District of Illinois, Danville Division, are included in the Appendix as Exhibits A and B, respectively.

JURISDICTION

The respondent brought his action for declaratory and injunctive relief and damages under the provisions of 42 U.S.C. §1983, claiming that the petitioners, acting under color of state law, terminated the respondent's contract of employment without cause, without notice and without hearing in violation of respondent's right to due process of law under the Fourteenth Amendment. The District Court found jurisdiction vested under the provisions of 28 U.S.C. § 1343(3). Over petitioners' Motion to Dismiss for lack of jurisdiction, the District Court conducted a bench trial and entered its Findings of Fact, Conclusions of Law, Memorandum, Opinion and Final Order on June 13, 1982.

Timely appeal was perfected to the United States Court of Appeals for the Seventh Circuit by the petitioners. On April 19, 1983, a split Court of Appeals affirmed the District Court by a two to one decision.

Jurisdiction of the United States Supreme Court to review the decision of the Court of Appeals by Petition for Writ of Certiorari is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Fourteenth Amendment to the Constituion of the United States, 42 U.S.C. §1983 and the Illinois School Code, c. 122, Ill.Rev.Stat., are set forth in the Appendix as Exhibit E.

STATEMENT OF THE CASE

The petitioners are the Board of Education of Paris Union School District No. 95 (Board), Paris, Illinois, and three individual members thereof. The respondent (Vail) is a public school teacher certified under the laws of the State of Illinois.

Illinois has a statutory tenure system found in Sections 24-11 and 24-12 of The Illinois School Code, c. 122, Ill.Rev.Stat. (1981). Under this statutory scheme, a public school teacher can acquire tenure only after two years of full-time, consecutive, year-to-year employment. c. 122, §24-11, Ill.Rev.Stat. (1981). Having acquired tenure, a teacher is entitled to continued employment absent dismissal for cause. A teacher without tenure is, in essence, an at will employee of the school board under Illinois law.

Procedural protection afforded an Illinois public school teacher before he is discharged corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be discharged except for cause upon specific charges and pursuant to certain procedures. See Section 24-12 of the Illinois School Code, App. 58-61.

In contrast to the aforequoted protections afforded to the tenured teacher, the School Code provides relatively little protection for a nontenured teacher who simply is not reemployed for the next year. A nontenured teacher completing the first year of probationary service, only need be informed at least sixty (60) days before the end of the school term of his nonretention, and a teacher completing the second year of probationary service is additionally entitled to know the reasons for the nonrenewal. Section 24-11 of the Illinois School Code provides, *inter alia*:

. . . .

> Any teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason therefor, by registered mail by the employing board at least 60 days before the end of such period. For the purpose of determining contractual continued service, the first probationary year shall be any full time employment from a date before November 1 through the end of the school

year. . . .

> Any full-time teacher who is completing the first year of the probationary period described in the preceding paragraph, or any teacher employed on a full-time basis not later than January 1 of the school term, shall receive written notice from the employing board at least 60 days before the end of any school term whether or not he will be re-employed for the following school term. . . .

On June 15, 1980, the search committee for the petitioner Board traveled to Joliet, Illinois, to interview the respondent for a job as athletic director and football coach. Respondent was at that time employed as supervisor of recreation and physical education for the Stateville Correctional Center in Joliet. While discussing possible employment, respondent expressed concern regarding the length of the proposed contract. The committee told respondent that the length of the contract would be determined by the Board.

On June 24, 1980, the petitioner Board met in special session to consider hiring respondent. The Board informed respondent that under the Illinois School Code it could offer him a contract of only one year. However, according to the findings of fact, it was the concensus of the Board that it would orally assure respondent that his contract would be renewed at the end of the first year. When Dr. James Cherry, the Superintendent, conveyed the offer and assurance to respondent, respondent accepted, traveled to Paris to execute the one year written contract and subsequently assumed the duties of athletic director and football coach.

On March 2, 1981, during respondent's first year of employment, the Board met in public session; and pursuant to, and in full compliance with the statutory provisions outlined in Section 24-11 of the Illinois School Code, voted not to renew respondent's contract for the following year. No hearing or reasons for the nonrenewal were given to respondent, a procedure which complies with the statutory requirements

of School Code Section 24-11.

The respondent then brought this action in Federal District Court, alleging that the decision not to rehire him infringed his Fourteenth Amendment rights. He attacked the decision of the Board both in substance and procedure. Finding that the respondent had an expectation of continued employment for a second year, the District Court entered judgment for the respondent on procedural due process grounds because of the failure of the Board to give the respondent notice of the reasons for nonretention and an opportunity for a hearing. The District Court awarded respondent $19,850.99 in stipulated damages. The Court of Appeals, with one judge dissenting, affirmed the District Court's decision.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals for the Seventh Circuit is inconsistent with the Supeme Court's decisions in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

In 1972, this Court decided the companion cases of *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Since those decisions, the Court has considered other "property interest" questions, but has not decided any case specifically involving a probationary public school teacher's claim to Fourteenth Amendment property interest protection within the backdrop of a statutorily imposed job tenure system. See *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Jago v. Van Curen*, 454 U.S. 14, 18-19, 102 S.Ct. 31, 70, L.Ed.2d 13 (1981) *(per curiam)*; and *Leis v. Flynt*, 439 U.S. 438, 442, 99 S.Ct. 698, 58 L.Ed.2d 717,

reh. den. 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979)*(per curiam)*.

In its broadest sense, *Roth* held that if a state college teacher had no right under state law to continued employment, he had no property right under the due process clause. Similarly, although primarily addressing the issue of *de facto* tenure, the Court in *Sindermann* reiterated the significance that a statutory tenure system has when analyzing a teacher's claim to procedural due process protection.

The majority opinion of the Court of Appeals in the instant case appears to rely primarily on *Sindermann*, while Judge Eschbach, in his concurring opinion, addresses the applicability of *Roth* at length. On the other hand, Judge Posner, in his vigorous and lengthy dissent, concludes that "[t]he Supreme Court has not decided the question in this case." *Vail v. Board of Education of Paris Union School District No. 95*, No. 82-1202, Slip Op. at 41 (7th Cir., April 19, 1983).

Judge Eschbach opines that if a probationary employee can prove the existence of an implied contract right to continued employment under state law, he has satisfied the requirements set forth in *Roth* to establish a protectible property interest under the Fourteenth Amendment. *Vail v. Board of Education of Paris Union School District No. 95*, No. 82-1202, Slip Op. at 15 (7th Cir., April 19, 1983). Likewise, the majority opinion reasons that once the existence of an implied contract is established by a probationary teacher, a protectible property interest is created inspite of a statutory tenure scheme. Slip Op. at 6.

Petitioners contend that Judge Eschbach has misread *Roth*, and the majority opinion has chosen to ignore that part of the *Sindermann* decision which specifically addresses the role that a statutory tenure system plays when assessing a probationary teacher's claim to a protectible property interest in continued employment.

Petitioners agree with Judge Posner that the *Sindermann* Court attached special meaning to "tenure" when analyzing

a due process claim. The *Sindermann* Court stated the importance of tenure when it said:

> [w]e do not now hold that the respondent has any such legitimate claim of entitlement to job tenure. For '[p]roperty interests. . .are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . .' Board of Regents v. Roth, *supra,* 408 U.S, at 577, 92 S.Ct., at 2709. *If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated.* (Emphasis added) 408 U.S. at 602, n. 7, 92 S.Ct. at 2700.

Sindermann thus holds that under a statutory tenure system a probationary employee, or otherwise nontenured teacher, can have no exception of continued employment since the state has seen fit to restrict such a right to tenured employees. In other words, a probationary teacher's implied contract right to continued employment can never rise to the level of a property interest protected by the Fourteenth Amendment when viewed within the framework of a statutory tenure system. To hold otherwise is an affront to the plain language in *Sindermann.*

II

The decision of the Court of Appeals for the Seventh Circuit is in conflict with at least one other federal circuit court.

Neither the majority nor concurring opinion speak to or attempt to distinguish *Ryan v. Aurora City Board of Education,* 540 F.2d 222, decided in 1976 by their brethren from the Sixth Circuit. The Petitioners contend that *Ryan* is virtually indistinguishable from the instant case with regard to the implied promises considered in each and the impact of those promises on tenure statute proscriptions.

In *Ryan*, the plaintiffs, like Vail, were nontenured teachers under a statutory tenure system which conferred tenure rights upon such teachers only after a period of probationary employment. The plaintiffs in *Ryan* argued that certain regulations adopted by the board of education contained a clearly "implied promise" under *Roth* to continued employment, thereby creating a property interest protectible by the Constitution. The basis of the "implied promise" in *Ryan* is the only distinguishing fact from Vail; and that distinction is hollow in light of the fact that both "implied promises" were the creation of the employing boards of education. In other words, the implied promise occasioned by a concensus opinion of the Board in Vail is no different than the implied promise created by rule or regulation in *Ryan*.

The *Ryan* Court, relying on that part of the *Sindermann* opinion cited above, but not addressed by the majority opinion in the case at bar, concluded "that a nontenured teacher has no 'expectancy' of continued employed *whatever may be the promises* of the institution where there exists a statutory tenure system". (Emphasis added). The Court stated at 227 that "[t]his conclusion is supported by the Supreme Court's decision in Sinderman."

III

There is no federal interest in this case under 42 U.S.C. §1983. Assuming arguendo that respondent had an enforceable two (2) year contract under state law, he had no litigable property right under the due process clause simply because he possessed such a contract right.

This Court has yet to equate a nontenured teacher's contract right to employment with a property right secured by the Constitution.

Breach of contract claims have traditionally involved state causes of action, and there is no reason to believe that a person claiming a breach of an implied contract such as re-

spondent does not have an adequate remedy at law in a state court. By elevating a right of employment in an implied contract to the status of a property right protected by the Fourteenth Amendment, the Court of Appeals has opened the floodgates to a new wave of litigation under 42 U.S.C. §1983. Many nontenured teachers who are subject to state statutory tenure systems will now be encouraged to bring suit in federal courts arguing that they were promised more than one year of employment. Since in Illinois, like most other states, an implied contract can be imputed from a meeting of the minds, nontenured teachers will be able to argue the existence of oral agreements with school boards or their agents for multi-year employment. This result obviates the distinction between tenured and nontenured employees, and defeats the legislative intent to create a period of probationary employment before tenure attaches.

Illinois courts have held that the probationary period is a statutorily mandatory term, and a board may not alter the probationary period. *Bessler v. Board of Education*, 43 Ill.App.3d 322, 370, 356 N.E.2d 1253 (1976), modified 69 Ill.2d 191, 370 N.E.2d 1050 (1977).

If the decision of the Court of Appeals is allowed to stand untested, other lower courts shall be encouraged to read the Court's language in *Sinderman* too broadly allowing for an unnecessary amount of litigation in the federal courts, encroaching on the domain of the state courts. It may also signal the end of many state statutory tenure provisions by obviating or at least diluting the distinction between probationary and tenured employment status.

IV

The Court of Appeals' interpretation of Section 24-11 of the Illinois School Code, c. 122, Ill.Rev.Stat., is untenable in view of the Illinois Supreme Court's interpretation and construction of Section 24-11.

It is undisputed that Constitutionally protected property

rights must find their source from state law. *Board of Regents v. Roth*, 408 U.S. at 577, 92 S.Ct. at 270, 33 L.Ed.2d 548 (1972). In the absence of any authoritative interpretation of state statutes by a state court a federal court is bound to apply rules of construction which are consistent with those pronounced by a state's highest court when interpreting a state statute. *Board of Regents v. Roth*, 408 U.S. at 604, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The Court of Appeals simply has not done this in the case at bar.

Assuming arguendo that an implied two year contract is found between the petitioners and respondent, petitioners strongly contend that such a contract is unenforceable under Illinois law, and, therefore, not sufficient to constitute a property interest.

The Illinois legislative plan as to tenure and public school teachers is plain. New teachers in a school district are subject to a two year probationary period consisting of two separate one-year contracts before they may attain tenure. c. 122, §24-11, Ill.Rev.Stat. (1981). A school district may choose not to rehire a first-year teacher merely by giving notice of nonrenewal within the statutory period. A second-year teacher must be given timely notice and the reasons for nonrenewal. c. 122, §24-11, Ill.Rev.Stat. (1981). For the Court of Appeals to find as a matter of law that the respondent, as a first-year probationary teacher, could have properly contracted with the petitioners for more than one year is inconsistent with not only the spirit, but also the clear meaning of the statute.

Although the Illinois Supreme Court has never decided the issue of the legality of the two year probationary contract, the petitioners contend that the results would be inapposite to those of the Court of Appeals. At Page 7 of its opinion, the Court of Appeals holds that "[t]here is simply no provision of the Code placing an express statutory 1 year time limit on contracts to be offered to probationary teachers". Having so concluded, the Court of Appeals

makes short work of petitioners' argument that Section 24-11 of the Illinois School Code precludes a two-year probationary contract.

While the Court of Appeals found no express statutory prohibition against two-year probationary contracts, the Court of Appeals was likewise unable to point to a statutory provision permitting Illinois school boards to hire teachers to multi-year contracts. The Court of Appeals reasoned that because the provisions which empower boards to hire teachers do not limit the length of teacher contracts, multi-year contracts are sanctioned by state law. This is a clear misreading of the Illinois statutory tenure scheme. Furthermore, such a conclusion ignores Illinois Supreme Court decisions which support the contention that a school board has only those powers expressly authorized by the state legislature through statute. *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill.2d 540, 551, 370 N.E.2d 233 (1977), *Northern Illinois Automobile Wreckers and Rebuilders Association v. Dixon*, 75 Ill.2d 53, 60, 387 N.E.2d 320 (1979), cert. den. 444 U.S. 844, 100 S.Ct. 87, 62 L.Ed.2d 57 (1979), and *City of Chicago v. Fair Employment Practices Commission*, 65 Ill. 2d 108, 112-113, 357 N.E. 2d 1154 (1976). Furthermore, it ignores previous Illinois Supreme Court constructions of Section 24-11 and its provisions. The Illinois Supreme Court has consistently construed Section 24-11 strictly, since it (the Tenure Act) created liabilities where none would otherwise exist. *Johnson v. Board of Education of Decatur School District No. 61*, 85 Ill.2d 338, 423 N.E.2d 903 (1981) and *Illinois Education Association Local Community High School District 218 v. Board of Education of School District 218, Cook County*, 62 Ill.2d 127, 340 N.E. 2d 7 (1975).

Had the legislature meant boards to have the power to offer teachers multi-year contracts, it would have specifically so provided as it did in Sections 10-23.8 and 10-23.8a of the Illinois School Code. Section 10-23.8 states, *inter alia*:

§10-23.8. Superintendent under multi-year contract.

> To employ a superintendent under a multi-year contract. No such contract can be offered or accepted for less than or more than three years, except for a person serving as superintendent for the first time in Illinois. In such case, the initial contract shall be for a two year period. Such contract may be discontinued at any time by mutual agreement of the contracting parties, or may be extended for an additional 3 years at the end of any year.
>
> . . . .

Section 10-23.8a states, *inter alia*:

> §10-23.8a. Principal under multi-year contract. To employ a principal under a multi-year contract. No such contract can be offered or accepted for less than or more than 3 years, except for a person serving as principal for the first time in Illinois. In such case, the initial contract shall be for a 2 year period. Such contract may be discontinued at any time by mutual agreement of the contracting parties, or may be extended for an additional 3 years at the end of any year.
>
> . . . .

The clear intent of the Illinois tenure system is that probationary teachers may be issued only year-to-year contracts. To impute a contract entitlement to multi-year employment to a nontenured teacher is to defeat the scheme of probationary employment intended by the legislature.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

THOMAS R. MILLER
Miller, Tracy & Braun
Law Offices, P.C.
P.O. Box 227
Monticello, IL 61856

APPENDIX

EXHIBIT A

(No. 82-1202 – Judgment affirmed.)

JESSE A. VAIL, Apellee, v. BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART, Appellants.

Opinion filed April 19, 1983. – Rehearing denied May 26, 1983.

ESCHBACH, J.E., concurring.

POSNER, R.A., dissenting.

Appeal from the United States District Court for the Central District of Illinois, Danville Division. The Hon. Harold A. Baker, Judge, presiding.

Thomas R. Miller, of Miller, Tracy & Braun Law Offices, P.C., of Monticello, and S. Craig Smith, of Dillavou, Overaker, Asher & Smith, of Paris, for appellants.

Marc J. Ansel, of Erwin, Martinkus, Cole & Ansel, Ltd., of Champaign, for appellee.

CIRCUIT JUDGE WOOD delivered the opinion of the court:

In this § 1983 action this court must once again address the meaning of "property" as used in the Due Process Clause. The district court in a bench trial awarded $19,850.99 in damages for the unlawful termination of the plaintiff-appellee from a position in the school system of Paris, Illinois. We affirm.

I.

This case arose because of the efforts of the Board of Education of Paris Union School District No. 95 (Board) to secure the services of the plaintiff-appellee Jesse A. Vail (Vail) as an athletic director and football coach. At the time

the Board sought his services Vail was employed as supervisor of recreation and physical education for the Stateville Correctional Center in Joliet, Illinois.

On June 15, 1980 a search committee for the Board traveled to Joliet. They held a breakfast meeting with Vail, visited his place of employment, and later met with Vail in his home. In addition to talking about the nature of the job duties and the salary, discussion between the search committee and Vail centered on job security and the length of the term of the proposed contract.

Vail was concerned about the amount of time necessary to correct deficiencies that existed in the athletic program in Paris as well as giving up his job at Stateville. In response to these concerns the committee stated that the length of the term of the contract was a matter to be determined by the full Board and that the committee itself could make no commitment beyond one year.

According to the findings of fact, on June 24, 1980 the Board met in special session to consider hiring Vail. At that meeting the Board unanimously agreed to offer Vail a contract of employment as athletic director and football coach. It was the consensus of the Board that it would assure Vail of two years in that position.

The Board instructed Dr. James Cherry, the superintendent, to convey an offer to Vail and to explain the Board's intention to renew the one-year contract at the end of the first year. Vail was informed of the offer and told that while the Board could not offer him more than a one year contract, it could assure him of extending the contract for a second year. Vail accepted, traveled to Paris to execute a written contract, and subsequently assumed the duties of athletic director and football coach.

On March 2, 1981 the Board met in public session and voted not to renew Vail's contract for the ensuing year. Vail was not given any explanation as to the reason for his termination, nor was he given any sort of hearing.

II.

On these findings of fact the district court held that Vail had a constitutionally protected property interest in his continued employment with the Board. Citing *Perry v. Sindermann*, 408 U.S. 593 (1972), the court held that the Board acting under color of state law had deprived Vail of property without due process of law and awarded $19,850.99 in stipulated damages.

The Board's principal argument on appeal is that the district court erred in concluding that Vail had any constitutionally sufficient property interest to state a claim under 42 U.S.C. § 1983. The Board contends that Vail had no more than a mere subjective expectation of continued employment and his sole rights as a new teacher are governed by Illinois law which only requires the Board to give 60 days notice before the end of a school term of its decision to terminate.[1]

The nature of property interests to be protected by the Due Process Clause of the Constitution has been addressed in many contexts by the Supreme Court. Most relevant to the present case are a pair of cases where the Court assessed the property interests of two state university professors each terminated at the end of a one-year contract without a hearing. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Court held that a teacher terminated after one year had no property interest in his continued employment where his unilateral expectations had no basis in statute, contract, or mutually explicit understanding with the university. *Id.* at 578. In the companion case, *Perry v. Sindermann*, 408 U.S. 593 (1972), the plaintiff had been terminated after having worked for a number of years under a series of one-year contracts. Here the Court found a property interest in continued employment that had been fostered by the rules and

---

[1] There is no contention that the Board failed to act in compliance with this requirement. *See infra* pp. 6-7.

the policy of the university, despite the lack of tenure or a contractual provision. *Id.* at 599-601.

In defining the nature of a protected property interest Justice Stewart stated in *Sindermann*:

> We have made clear in *Roth*, that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather "property" denotes a broad range of interests that are secured by "existing rules or understandings." A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

408 U.S. at 601 (citations omitted). Justice Stewart went on to state that the "existing rules or understandings" need not be a formal tenure system or even an explicit contractual provision, citing implied contracts as sufficient to constitute a protected property interest. *Id.* at 601-02. *See also Connell v. Higginbotham*, 403 U.S. 207 (1971) (applying due process to teacher without tenure or a formal contract but with a clearly implied promise of continuing employment).

Sindermann does not turn on the implied contractual provision being one of tenure. The case law clearly establishes that a property interest can be created through a statutory entitlement, the operation of institutional common law, or through principles of contract law. In addition to *Sindermann* the Supreme Court has stated explicitly: "A property interest in employment can, of course, be created by ordinance or by an implied contract." *Bishop v. Wood*, 426 U.S. 341, 344 (1976). *Accord, Jago v. Van Curen*, 454 U.S. 14, 18-19 (1981) (*per curiam*); *Leis v. Flynt*, 439 U.S. 438, 442 (1979) (*per curiam*). It is the binding nature of the contract rather than its length which is significant. This circuit has also stated rather bluntly: "A term of employment set by contract has been recognized as a property interest which the state cannot extinguish without conforming to the dictates of pro-

cedural due process." *Hostrop v. Board of Junior College District No. 515*, 471 F.2d 488, 494 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973). *Accord, Adams v. Walker*, 492 F.2d 1003 (7th Cir. 1974).

In this case we deal with the unlawful termination of a government employee, not some other matter of state business, a subject which the Supreme Court repeatedly has held to implicate constitutional rights under both the "property" and the "liberty" interests protected by the Due Process Clause. *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Roth, supra; Sindermann*, 408 U.S. at 597 and cases cited therein; *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961). *Cf. Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976) (liberty interest in obtaining government employment). When the government acts as employer, the application of the Due Process Clause protects the individual from arbitrary and capricious conduct and legitimizes governmental action when exercised through proper channels.

Vail had a two-year employment promise rather than a commitment for indefinite employment, as in the case of tenure. The length of time that an individual retains an asset affects the *weight* or *value* of the interest, but not the *nature* of the interest. Had Vail been successful in rebuilding the school's athletic program to the school's satisfaction, as no doubt all parties hopefully anticipated, Vail would have benefited after two years from statutory tenure, as do other teachers. Athletic directors and coaches are generally not regarded as second class members of a balanced school program. *Roth*, 408 U.S. at 570-71. We affirm the finding that the Board deprived Vail of his legitimate expectation of continued employment in terminating him without cause before the expiration of his employment period, and that such deprivation is a violation of due process and actionable under the Civil Rights Act.

The Board argues that under Illinois law there was no evidence of an implied employment contract for two years.

Under Illinois law, an implied contract is proven by circumstances showing that the parties intended to contract or by facts and circumstances from which a meeting of the minds can be inferred. *See generally*, 12 Illinois Law & Practice *Contracts* § 4 (1982); *United States ex rel. J.C. Shaeffer Electric, Inc. v. O. Frank Heinz Construction Co.*, 300 F. Supp. 396 (S.D. Ill. 1969); *Arthur Rubloff & Co. v. Drovers National Bank*, 80 Ill. App. 3d 867, 400 N.E.2d 614 (1st Dist. 1980). While it is true that property interests stem from rules and understandings governed by state law, the Illinois law of implied contracts is quite sufficient in this case to create a property interest protected under 42 U.S.C. § 1983.

What the Board actually challenges is the district court's findings of fact. After analyzing conflicting evidence on the question of the deliberations of the Board and the representations made to Vail concerning the length of his employment, the district court credited the testimony of certain Board members, Davis and McHenry. This decision was based on the demeanor of the witnesses as well as lack of recollection and impeachment on certain points testified to by the opposing witnesses. A credibility finding is a finding of fact which, under Rule 52 of Federal Rules of Civil Procedure, "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Fed. R. Civ. P. 52. Based on the record in this case we cannot reverse these findings as clearly erroneous.

III.

The Board argues that even if an implied contract is found between Vail and the Board that the contract is unenforceable under Illinois law and therefore not sufficient to constitute a property interest. First, the Board contends that the provisions of the Illinois Teacher Tenure Act, Ill. Rev. Stat. ch. 122, § 24-11 (1979), preempt any property interest created by the implied contract. Such a conclusion is not supported by § 24-11 or any other provision of the Illinois

School Code, Ill. Rev. Stat. ch. 122, § 1-1 *et seq.* (1979).

Section 24-11 itself contemplates just such a two-year probationary period as was promised Vail. The statute states:

> Any teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms[2] shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason, therefor, by registered mail by the employing board at least 60 days before the end of such period.

Ill. Rev. Stat. ch. 122, § 24-11 (1979). The fact that the same section provides a different procedure to terminate probationary teachers during their first year of teaching does not suggest that a two-year contract is not permitted under Illinois law[3]. It is significant that Vail is not claiming any right to tenure under the Code which would have been extinguished by the actions of the Board in compliance with § 24-11. He merely claims an agreement for a two-year contract as promised by the Board. There is simply no provision of the Code placing an express statutory one-year time limit

---

[2] A term is defined as "the portion of the school year, July 1 to the following June 30, when school is in actual session." Ill. Rev. Stat. ch. 122, § 24-11 (1979).

[3] The Board relies on the portion of that section which states:

> Any full-time teacher who is completing the first year of the probationary period described in the preceding paragraph, or any teacher employed on a full-time basis not later than January 1 of the school term, shall receive written notice from the employing board at least 60 days before the end of any school term whether or not he will be re-employed for the following school term. If the board fails to give such notice, the employee shall be deemed re-employed, and not later than the close of the then current school term the board shall issue a regular contract to the employee as though the board had re-employed him in the usual manner.

on contracts to be offered to probationary teachers.[4]

The Board also argues that any implied contract would be unenforceable because it arises from an *ultra vires* Board act. The appellants contend that a two-year contract would be an *ultra vires* limitation on the Board's ability to terminate teachers at will. Appellants cite the provision of § 10-22.4 as granting the Board discretionary power to dismiss, or to fail to renew a teacher's employment. While it is true that these powers cannot be delegated or contracted away to a third party, the Board's exercise of its discretion in this case in offering a two-year contract in no way violates the express or implied requirement of § 10-22. *See Libertyville Education Association v. Board of Education of School District No. 70, Lake County*, 56 Ill. App. 3d 503, 371 N.E.2d 676 (2d Dist. 1977).

Appellant's final contention is that the oral promise to renew employment after the first year is unenforceable under the Illinois Statute of Frauds.[5] This argument has no merit given, under Illinois law, as elsewhere, the Statute of Frauds would not bar enforcement of the contract where there has been partial performance by the parties. *Anas-*

---

[4] Appellant's citation of our decision in *McElearney v. University of Illinois, Chicago Circle*, 612 F.2d 285 (7th Cir. 1979), is therefore inapposite. First, and foremost, McElearney received only "informal assurance" in contrast to the instant case in which Vail received promises which rose to the level of an implied contract. Second, the explicit rules governing *tenure* in *McElearney* suggest that any reliance to be based on a supposed entitlement to *tenure* by virtue of the informal assurances McElearney received would be unreasonable. Finally, our holding in *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976), suggests that a cause of action for state action in violation of due process would exist even if Illinois law only permitted a one-year contract.

[5] Ill. Rev. Stat. ch. 59, § 1 (1981) states:

> No action shall be brought . . . upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise . . . shall be in writing.

taplo v. Radford, 14 Ill. 2d 526, 153 N.E.2d 37 (1958); *Yorkville National Bank v. Shaefer*, 71 Ill. App. 3d 137, 388 N.E.2d 1312 (2d Dist. 1979); *Grundy County National Bank v. Westfall*, 13 Ill. App. 3d 839, 301 N.E.2d 28 (3rd Dist. 1973).

Even if we were to assume *arguendo* that no *enforceable* contract under state law existed between Vail and the Board, we are not prepared to hold that this alone precludes the establishment of a protected property interest. The Civil Rights Act itself speaks of actions taken under *color* of state law and not under authority of state law. The Supreme Court has stated:

> Although the underlying substantive interest is created by "an independent source such as state law," federal constitutional law determines whether that interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause.

Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 9 (1978).

More recently, the Court has refused to limit constitutional "property" rights to mere contract rights. *Jago v. Van Curen*, 454 U.S. 14 (1981). Legitimate and reasonable reliance on a promise from the state can be the source of property rights protected under the Due Process Clause and the civil rights statutes. *Sindermann*, 408 U.S. at 602. In *Soni v. Board of Trustees of the University of Tennesse*, 513 F.2d 347 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976), the court held that reasonable reliance on assurances and conduct by university officials that the plaintiff had a tenure track position was sufficient to create a property interest despite state law and university regulations which prohibited an alien from receiving such an appointment. *See also Harris v. Arizona Board of Regents*, 528 F. Supp. 987 (D. Ariz. 1981). Our own decision in *McElearney v. University of Illinois, Chicago Circle*, 612 F.2d 285 (7th Cir. 1979), is in no way inconsistent with this reliance standard given that the

plaintiff in *McElearney* received only informal assurances thus failing to meet the legitimate and reasonable reliance necessary to create a property interest.

The actions of the Board worked to deny Vail's legitimate expectations of continued employment. The extent of his reliance on the Board's promise is shown by the fact he left Joliet where he and his family had lived for thirteen years, left a job he had held for ten years, and even took a salary cut to take the job in Paris. The reasonableness of the reliance is illustrated by the concerns over security Vail raised from his very first meeting with Dr. Cherry to the final actions of the Board and the promises Vail received as an inducement to taking the job.

Parratt v. Taylor, 451 U.S. 527 (1981), held a claim was not stated under 42 U.S.C. § 1983 when certain hobby materials ordered by mail by an inmate of a Nebraska prison were not delivered to him due to the unauthorized failure of state agents to follow established state procedures. The remedy was found to lie under state law. In our recent decision in *Wolf-Lillie v. Sonquist*, Nos. 81-1117 & 81-2833 (7th Cir. Jan. 31, 1983), we held that *Parratt* applied to that plaintiff's § 1983 due process allegations. In that case the sheriff had executed a writ of restitution to seize plaintiff's house trailer contrary to the state statute. In both *Parratt* and *Wolf-Lillie* the plaintiffs were relegated to post-deprivation state law tort remedies. Pre-deprivation hearings were neither practical nor appropriate in either case where clearly established state policies were involved and ignored due to negligence or otherwise. We see neither case as controlling the present case. The Supreme Court had the opportunity but refused to expand *Parratt* beyond "a tortious loss of property or result of a random and unauthorized act by a state employee." *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

IV.

Finally, the appellants argue that the district court's award of damages is improper. They contend that the proper remedy in this case is either a hearing to determine whether the termination was justified or a remand to have the plaintiff come forward with proof of actual losses.

The issue of "good cause" having been put into issue by the pleadings and fully tried and decided by the district court negates the need for any further proceedings on this issue. The district court's finding that the Board was in breach of contract and, therefore, that Vail's termination was not for good cause, distinguishes this case from *Carey v. Piphus*, 435 U.S. 247 (1978). The stipulated damages awarded in this case adequately afford a remedy for the harm suffered from the deprivation of Vail's property interest without due process of law.

V.

Accordingly, this case is

AFFIRMED

ESCHBACH, *Circuit Judge*, concurring. While I join in Judge Wood's opinion, I write separately in order to respond to Judge Posner's strongly worded dissenting opinion. With all respect, I believe that my brother Posner treats this case as if it were one of first impression, and reasoning from fundamental principles concludes that the case does not belong in federal court. The central issue this case presents, however, is not an issue of first impression–this court expressly held in *Hostrop v. Board of Junior College District No. 515*, 471 F.2d 488 (7th Cir. 1972), that a term employment contract provides a public employee with a property interest in continued employment during his term and that before such an employee may be discharged he must be afforded a meaningful opportunity to be heard. I believe that *Hostrop* was correctly decided. When I say "correctly" decided, I mean that it was decided in accordance with the

authoritative pronouncements of the United States Supreme Court and remains good law in light of subsequent precedent. Whether it was correctly decided in some sort of ultimate jurisprudential or philosophical sense is not within my domain as an intermediate appellate court judge once I have decided that it was properly decided in the former sense. My brother Posner calls this approach to deciding cases "putting the blame on the [Supreme] Court." Post at 41. I call it adherence to *stare decisis* and to a superior authority.

In light of the fact that Judge Posner believes that my brother Wood and I have engaged in a selective reading of precedent, reading some cases "broadly" and others "narrowly", I shall explain my own understanding of what I consider to be the controlling authority in this case.

In *Roth v. Board of Regents*, 310 F.Supp. 972 (W.D. Wisc. 1970), *aff'd*, 446 F.2d 806 (7th Cir. 1971), *rev'd*, 408 U.S. 564 (1972), the plaintiff was hired as a teacher at a state college for a one-year term. When college officials did not renew his contract of employment, Roth argued that their refusal to do so violated both his First Amendment rights and his procedural due process rights. Judge Doyle granted Roth's motion for summary judgment on the procedural due process claim and stayed proceedings on the First Amendment claim. Employing the general balancing test of *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1960), Judge Doyle balanced Roth's interests in being rehired and the state's interests in summary non-retention decisions and concluded that due process required that college officials provide Roth with an explanation for their decision and an opportunity to be heard regarding that decision. Judge Doyle, while recognizing that the substantive First Amendment claim was a discrete one, also reasoned that requiring a hearing before the decision concerning retention was made would also serve to vindicate important First Amendment interests at stake in the college environment. 310 F.Supp. at 979-80. This court affirmed Judge Doyle's judg-

ment employing essentially the same rationale as the district court. We balanced the grievous loss one suffers when not retained in a job against the need for a summary decision, 446 F.2d at 808-09, and observed that the the requirement of a hearing would serve as a "prophylactic" against decisions based on impermissible reasons, *id.* at 810. Judge Duffy dissented, basically arguing that since Roth was not a tenured faculty member, the college officials could deny him re-employment summarily.

The Supreme Court's decision reversing our judgment was a landmark in constitutional jurisprudence. Eschewing a general balancing test for the purpose of determining whether the Fourteenth Amendment mandates procedural protections concerning a state decision which adversely affects an individual, the Court instead held that the threshold question in a procedural due process case is whether an individual has a liberty or property interest at stake. The Court recognized the broad and majestic nature of these terms, but at the same time gave them meaning. The Court ascertained the meaning of property inductively, by examining cases in which procedural due process protections had been accorded even though the cases themselves did not expressly state that the individual interests at stake constituted property.

> Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg v. Kelly*, 397 U.S. 254. *See Flemming v. Nestor*, 363 U.S. 603, 611. Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, *Slochower v. Board of Education*, 350 U.S. 551, *and college professors and staff members dismissed during the terms of their contracts, Wieman v. Updegraff*, 344 U.S. 183, have inter-

ests in continued employment that are safeguarded by due process. Only last year, the Court held that *this principle "proscribing summary dismissal from public employment without hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. Connell v. Higginbotham*, 403 U.S. 207, 208.

Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect *those claims upon which people rely in their daily lives*, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly, supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

408 U.S. at 576-77 (emphasis added) (footnotes omitted).

Having thus formulated the principles governing the identification of property interests for purposes of the due pro-

cess clause, the Court proceeded to apply these principles to Roth's situation:

> Just as welfare recipients' "property" interest in welfare payments was created and defined by statutory terms, so the *respondent's "property" interest in employment at Wisconsin State University–Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.*
>
> Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

408 U.S. at 578 (emphasis added) (footnote omitted).

In my view, the foregoing langugage is dispositive of the question of whether Vail had a property interest in continued employment in the instant case: the Court's authoritative interpretation of its past precedent concerning the employees dismissed during the term of their contracts, the principles which emerge from those decisions (*i.e.*, that one must have a legitimate claim of entitlement to a benefit and that a purpose of property is to protect those claims upon which people rely in their daily lives), and the application of those

principles in the case before it (*i.e.*, that Roth had a property interest during the term of his appointment), all compel that conclusion. Vail has established precisely what Roth failed to establish – a right to renewal of his one-year employment contract.

Judge Posner does not explain what significance he accords to the language of the *Roth* opinion. Rather, he merely states that *Roth* "held that if a state college teacher had no right under state law to continued employment, he had no property right under the due process clause." Post at 30. That tautological statement, however, is not very instructive, nor does it distinquish *Roth*. He also tells us that "we are not obliged to read Supreme Court decisions broadly in order to reach foolish results." Post at 33. Aside from those generalities, Judge Posner attempts to distinquish *Roth* by distinquishing *Perry v. Sindermann*, 408 U.S. 593 (1972), a companion case to *Roth*.

In *Sindermann*, the plaintiff was employed as a teacher in a state college under a series of one-year contracts. While state law did not provide for a tenure system, Sindermann argued that he had "de facto" tenure because of an understanding fostered by the college administration. Applying the principles announced in *Roth*, the Court emphasized that the

> "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." *Id.*, at 577. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. *Ibid.*

Id. at 601. An implied-in-fact contract, if recognized by state law, was held to create such a claim of entitlement, and Sindermann's allegations on this point were considered suffi-

cient to withstand summary dismissal.

Judge Posner tells us that the "important thing" in *Sindermann* was that plaintiff alleged that he had "tenure" which in Judge Posner's view is "special." The telling deficiency with this interpretation of *Sindermann* is that it finds no support in the Supreme Court's opinion. The language which Judge Posner quotes from *Sindermann* indeed uses the term tenure–it would be awkward to use another word in discussing Sindermann's claim that he had tenure. Sindermann was not contending that he had any express contract for continued employment; he argued he had de facto tenure. Judge Posner's interpretation not only finds no support in the Court's opinion, but is plainly inconsistent with it. First, it puts the *Sindermann* cart before the *Roth* horse. *Roth* announced the principal governing procedural due process cases, a principle which *Sindermann* merely applied to the facts of that case. There can be no doubt that the Supreme Court did not view tenure as "special." In *Roth* itself, the Court stated at the outset of the opinion that Roth "had no tenure rights to continued employment." 408 U.S. at 566. Perhaps Judge Posner would have ended his analysis of that case with that fact, as was suggested by the dissenting opinion in this court's consideration of the *Roth* case, but the Supreme Court adopted a far different analysis and did not view the absence of tenure as dispositive. Second, Judge Posner's interpretation is contrary to the Supreme Court's admonition that the property interests protected by the due process clause are not limited by a few rigid, technical forms.

Judge Posner's second, though interrelated basis for distinquishing or perhaps "interpreting" *Roth*, *Sindermann*, and our decision in *Hostrop* as well, is that those cases involved "teachers" whereas this case involves an athletic coach. A distinction is suggested between academic and non-academic teachers, and only the former are entitled to the special judicial solicitude which would transform their interests in continued employment into "property" interests. This

argument finds some support in the caselaw. It finds its support in a dissenting opinion and the district court's decision in *Hostrop* which this court reversed on the authority of *Roth* and *Sindermann*.

Justice Douglas' dissent in *Roth* emphasizes the importance of academic freedom, 408 U.S. at 582 *passim*, and also distinquishes between teachers and other workers in arguing in favor of according Roth a due process right to a hearing notwithstanding the fact he had no claim of entitlement to continued employment. If, in fact, teachers are entitled to special procedural protections to safeguard academic freedom, then a distinction such as that proposed by Justice Douglas would be the logical one to make–and a teacher would be entitled to a hearing on any decision not to retain him, irrespective of whether he had a claim of entitlement to continued employment, and irrespective of state law on the subject. Judge Posner embraces Judge Douglas' distinction, but does not apply it to its logical conclusion. Instead, he argues that the interest a teacher has in continued employment is property but the interest that a non-academic employee has in continued employment is not property. This position has a somewhat familiar ring to it, since it is essentially the position adopted by the district court in *Hostrop*, 337 F.Supp. 977 (N.D. Ill. 1972).

In *Hostrop*, a college administrator argued that he was entitled to a hearing prior to termination. The district court, denying relief, distinguished *this* court's decision in *Roth* on the ground that *Roth* involved a professor where the need for academic freedom was implicated; the district court found the administrator less deserving of protection, though it did not speak in property terms. After the Supreme Court's decisions in *Roth* and *Sindermann*, this court reversed. Our decision in *Hostrop*, Judge Posner states, "extended" *Sindermann* to term employment contracts, and did so "uncritically, without discussion of the distinction I have just noted [between tenure and term contracts]." Post at 31. Because of these purported factors, Judge Posner does not think we

must overrule *Hostrop* in order to hold that a term contract does not create a property interest; rather, we may simply "distinguish" it. First, *Hostrop* does not "extend" *Sindermann*; it applies the authoritative pronouncements of *Roth* to the case before it. Second, there was no reason for *Hostrop* to discuss the distinction Judge Posner would make between long-term and short-term employment relationships, for *Roth* and *Sindermann* make clear that no such doctrinal distinction exists. Third, *Hostrop* is not distinguishable because of the purported greater judicial solicitude that exists for teachers as opposed to other employees – in reversing the district court opinion, this court rejected such a distinction. Fourth, the related " speculat[ion]" that the *Roth*, *Sindermann*, and *Hostrop* courts treated the First Amendment claims and due process claims as distinct rights "because protection against arbitrary dismissal was thought necessary to prevent infringements of freedom of academic speech that would be too difficult to prove," post at 32, totally ignores the fact that both the district court and this court advanced that rationale in support of according protection in the *Roth* case itself and the Supreme Court rejected that approach. *See* 408 U.S. at 575 n. 14. Fifth, regardless of whether *Hostrop* represented an extention of *Roth*, it is the law of this circuit until this court overrules it–it cannot be "distinguished" on the ground that it did not expressly respond to an argument which a later court finds persuasive.

In summary on the property interest question, I believe *Roth* is dispositive, just as this court held in *Hostrop* in a similar case. In this regard, with all due respect to my brother Posner, I believe his opinion on this question resembles more the work of a legal commentator than that of an intermediate appellate court judge. He posits rationales for prior decisions and then concludes that his anaylsis of the instant case is consistent with those posited rationales, superimposing a unifying doctrinal thread onto the cases which would explain their outcome in a principled fashion.

In my view, however, the attempt to engraft his analysis onto those cases ignores the Supreme Court's enunciation of the guiding principles and amounts to substituting his opinion for the ones appearing in the United States Reports. I say this recognizing that often cases are decided on bases which are not fully articulated by the courts rendering the decisions and often after a series of decisions reveal that the rationale expressly embraced by the courts does not reflect the real basis of judgment, the old rationale is finally discarded and a new one takes its place. The law, from time immemorial, has evolved and matured through this process, and indeed *Roth* represents but one example of this process. The Supreme Court may well decide that the principles enunciated in *Roth* should be replaced. Writing, as I am, on the shores of Lake Michigan rather than the banks of the Potomac, I am not free to make that decision.

Judge Posner's second point concerns the nature of the interest created by state contract law and whether Vail was deprived of that precise interest when he was terminated. My examination of Illinois authority convinces me that Judge Posner is correct in concluding that the Illinois courts would not reinstate Vail to his position to serve a second year, but instead would only award money damages. *Bessler v. Board of Education*, 69 Ill.2d 191, 370 N.E.2d 1050 (1977). Because money damages would be Vail's sole state remedy, Judge Posner reasons the only right Vail ever had was a right to performance or damages for non-performance. The state has not deprived Vail of that disjunctive right, because it has never "refused" to pay damages in a state court proceeding. There are at least two reasons I find this conception of Vail's interest unpersuasive. First, if state law did provide for reinstatement, then under Judge Posner's analysis Vail still would not be "deprived" of property until the state courts "refused" to reinstate him. If that is not requiring exhaustion of state remedies, I do not know what would be an exhuastion requirement. Second, I believe that Judge Posner views Vail's legitimate interests created

by the contract too narrowly, and exalts abstraction over reality. Vail's dismissal deprived him of his livelihood—a livelihood he could legitimately believe would continue for the term of the agreement unless cause was shown for his termination. His reliance interest in that relationship, with all its significant real life consequences, was destroyed upon his termination.

Judge Posner's last point is a dispute concerning what process is due. He questions the need for a predeprivation hearing in this case. He does not address the analysis of the *Roth* opinion on this subject, 408 U.S. at 569-70, nor our analysis in *Hostrop* that a predeprivation hearing is required, 471 F.2d at 494-95 & n.15. Rather, he primarily contends that we distinguish *Parratt* on the "factitious" ground that it applies only to negligent deprivations of property.

In *Parratt v. Taylor*, 101 S. Ct. 1908 (1981), the Court held that the negligent loss of a prisoner's tangible personalty by the state, acting as a bailee, constituted a deprivation of property within the meaning of the Fourteenth Amendment. It proceeded to consider whether the prisoner should have been given a hearing about the matter before the state lost the property. Thus phrasing the question, the answer is obvious. Framed another, more traditional way, once a deprivation under color of law is established, the issue is what process is due. The Court began its analysis of that question by observing that it had "never directly addressed the question of what process is due a person when an employee of a State negligently takes his property." *Id.* at 1914. To answer *that* question, it first canvassed prior cases in which a predeprivation hearing had been required. "In all these cases," the Court observed, "deprivations of property were authorized by an established state procedure and due process was held to require predeprivation notice and hearing in order to serve as a check on the possibility that a wrongful deprivation would occur." *Id.* The Court then examined cases in which a predeprivation hearing was held unnecessary. "These cases recognize that either the necessity of

quick action by the State or the impracticality of providing any meaningful predeprivation process can, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, satisfy the requirements of procedural due process." *Id.* at 1915 (footnote omitted). The court then distinguished between "final" deprivations of property and "initial" deprivations of property, noting that a "meaningful" opportunity to be heard need not always require a hearing before the "initial" deprivation of property. Applying these principles to the case before it, the Court Stated:

> The justifications which we have found sufficient to uphold takings of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as an action under "color of law," is in almost all cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible to provide a meaningful hearing before the deprivation. That does not mean, of course, that the State can take property without providing a meaningful postdeprivation hearing. The prior cases which have excused the prior hearing requirement have rested in part on the availability of some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities.

Id. at 1915-16. The Court then proceeded to endorse the analysis employed by then Judge Stevens writing for this court in *Bonner v. Coughlin*, 517 F.2d 1313 (7th Cir. 1975), modified *en banc*, 545 F.2d 565 (1976), *cert. denied*, 435

U.S. 932 (1976), which emphasized the availability of a postdeprivation remedy. The Court concluded:

> Application of the principles recited above to this case leads us to conclude the respondent has not alleged a violation of the Due Process Clause of the Fourteenth Amendment. Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for the State to provide a predeprivation hearing. Moreover, the State of Nebraska has provided respondent with the means by which he can receive redress for the deprivation.
>
> Our decision today is fully consistent with our prior cases. To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an autmobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning "would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Paul v. Davis*, 414 U.S. 693, 701, 96 S. Ct. 1155, 1160, 47 L.Ed.2d 405. We do not think that the drafters of the Fourteenth Amendment intended the amendment to play such a role in our society.

Id. at 1917.

In my view, the Supreme Court in *Parratt* decided two discrete questions regarding the issue of whether plaintiff had been deprived of property without due process of law. The first question was whether due process required a predeprivation hearing. The court held that no such hearing was required, not *because* of the existence of postdeprivation remedies, but because a predeprivation hearing simply could not be meaningful—indeed, in the case of negligent deprivations, as the Court observed, a predeprivation hearing would be a practical impossibility. Hence, the state's failure to provide Parratt with a hearing before the state officials lost his property did not violate due process. Now it is true that the court said that in prior cases excusing a lack of a predeprivation hearing, the decisions rested in part on the availability of a postdeprivation proceeding, but in those cases a predeprivation hearing would have been meaningful, but the exigencies of the situation justified postponing the hearing until after the initial deprivation. The decisions in those cases—that no violation of due process had occurred—indeed rested on the availability of postdeprivation remedies, because once it was determined a predeprivation hearing was not feasible, that could not end the due process analysis. Nor did that conclusion end the due process analysis in *Parratt*. Rather, the second question which *Parratt* decided was whether the postdeprivation remedy accorded due process of law. The Court examined the remedy provided by state law, and concluded it would provide Parratt a meaningful opportunity to be heard regarding his claim, and that satisfied due process. A contrary conclusion in *Parratt*, of course, would have made § 1983 a font of tort law since predeprivation hearings are conceptually absurd with respect to injuries caused by the negligence of state actors. Any garden variety negligence cause of action against such actors would necessarily be cognizable under § 1983.

The instant case is not governed by *Parratt*. In this case, before the initial deprivation of Vail's property interest ocurred—that is, before Vail was discharged—he could have been provided with a hearing, and the hearing would have provided him with a meaningful opportunity to guard against the risk of a wrongful or erroneous decision. The hearing requirement cannot guarantee an erroneous decision will not occur, but it does serve as a check on that possibility. If Vail had been provided with such a hearing, and still had been discharged, and then attempted to bring a § 1983 action, relief would be denied, and *Parratt* would be applicable. In such a case, the "initial" deprivation of Vail's interest would have been in accordance with due process of law, and Vail could not complain about any "final" deprivation because such a deprivation would not have occurred unless and until he lost a breach of contract action in state court, in which case, assuming the state courts provided him with a full and fair opportunity to litigate his claim, he would have been accorded all the process that was due. In *Hostrop*, we explained the difference between federal and state interests in such a case as follows:

> The fact that plaintiff relies upon his employment contract to establish a property interest worthy of protection through the due process clause does not mean that his only remedy is a contract action in state court. A civil rights action based on the deprivation of due process and a contract action to recover damages for a breach are independent remedies. The civil rights action based on deprivation of a property interest established by contract seeks vindication for the arbitrary manner in which the contract was breached. A "garden variety" contract action seeks damages only for the losses caused by the breach once it has occurred in any manner whatsoever. There will be occasions when one action will lie but the other will not, as when the state has grounds to break an employment contract, but does so by violating an employee's due process

rights to notice and a hearing.

471 F.2d at 494 n.15.

Judge Posner's interpretation of *Parratt* accords great, indeed controlling significance to the statements in *Parratt* that in cases where predeprivation hearings were required, the deprivations were authorized by an established state procedure. Here, Judge Posner tells us, the deprivation occurred because of defendants' unauthorized failure to follow established state "procedure" regarding the honoring of contracts. He then questions, in light of *Parratt*, the continuing viability of *Monroe v. Pape*, 365 U.S. 167 (1961), which analyzed under the color of law question.

I believe Judge Posner's analysis of *Parratt* in this regard misconceives the precise issue before the *Parratt* Court. *Parratt* in no way undermines *Monroe v. Pape*—*Parratt* makes plain that even though the negligence of the prison officials was naturally unauthorized, it could not be questioned that their conduct satisfied the under color of law requirement. 101 S. Ct. at 1913. The fact that the conduct was unauthorized was significant only in as much as the conduct was mindless, and hence, not amenable to the salutary protections which a hearing in advance would provide. Moreover, and I think significantly, ministerial actions were at issue in *Parratt*, whereas in this case, a discretionary action is at issue. But in any event, assume that a predeprivation hearing is only required when the deprivation occurs as a result of an established state procedure. In this case, it did. The school board established the procedure for terminating individuals such as Vail, and that procedure was to vote on the matter without providing such individuals with a reason for the decision, nor a meaningful opportunity to be heard. Moreover, the Board authorized the termination; in *Parratt* no responsible official authorized the loss. Judge Posner uses the word "procedure" to mean policy, divines that there is a state policy regarding the honoring of con-

tracts, and hence, the Board's action was not authorized by state policy. In light of that analysis, his discussion of *Monroe v. Pape* is understandable—for the basic issue there was whether a person acting contrary to state law is acting under color of state law. That is not the question in this case, however, nor was it a question in *Parratt*.

Finally, *Parratt*, in analyzing cases in which a predeprivation hearing was required, noted, that the Court had recently "recognized that a driver's license is often involved in the livelihood of a person and as such could not be summarily taken without a prior hearing." 101 S. Ct. at 1914. If an interest which is only related to a person's livelihood requires a predeprivation hearing, termination of a person's livelihood should require such a hearing as well.

In conclusion, my research indicates that there has been no deluge of § 1983 cases such as this since our decision in *Hostrop*, nor is that surprising. States have been on notice since *Hostrop* that before discharging a state employee in Vail's position, they must give the employee a meaningful opportunity to be heard. Thus, Judge Posner's argument that this case takes another step down a road which leads to the displacement of state jurisdiction is wrong on several counts. First, *Hostrop* (if not *Roth* itself) took that step a decade ago. Second, if state officials want to avoid the federal courthouse, they need merely provide a meaningful predeprivation hearing. And finally, of course, the state may choose not to employ individuals for short, fixed terms; indeed, such contracts may be rather unusual for reasons having nothing to do with the hearing requirement imposed by the due process clause. Moreover, one wonders that if the result in this case is, as Judge Posner states, "contrary to every principle of federalism and good sense," post at 41, just why it is that the most he can say with "apodictic certainty" is that the result we reach "is not predestined by existing case law," post at 40-41.

In closing, I confess that I myself may question whether

there is a federal interest in this case warranting the intervention of the courts of the United States. If I were writing on a clean slate, I would have reservations about embracing a doctrine which led to that conclusion. In view of the current authoritative doctrine, however, I am convinced that Vail states a meritorious § 1983 claim, and therefore I need not embark upon the task of resolving my own doubts about the proposition one way or the other.

POSNER, *Circuit Judge*, dissenting. A school board has a squabble with its football coach and fires him, though his (implied) contract has a year to run. This court holds that the board's action violates section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, because: the Fourteenth Amendment forbids the state, of which the school board is an arm, to deprive anyone of life, liberty, or property without due process of law; a contract right is a species of property and was taken away here without a hearing; therefore the state acted unconstitutionally. If this logic is applied unflinchingly, any time a school board or any other local government body breaks a contract without first holding a hearing, the contractor—who need not be an employee, who could be a supplier of paper clips—can get damages in federal court. I am slightly comforted by the realization that the life of the law has not been logic and by the suggestion in Judge Wood's opinion that "other matter[s] of state business" may be treated differently from employment contracts. I would be more comforted if the opinion gave a reason for distinguishing the supply of goods from the supply of personal services, which it does not, and if it omitted the dictum that in the employment area no contract, express or implied, is needed to create a constitutionally protected property right.

But even if the decision in this case can be confined to employment contracts—even if it can be confined to cases where the employee is fired—it goes too far. There is no federal interest in this case, unless the Fourteenth Amendment is thought to invest with federal significance all state action, however unthreatening to the rights we deem fundamental.

Vail was not fired because he exercised his freedom of speech or some other liberty protected by the Constitution, or because of his race (in which event he would have a claim under the equal protection clause of the Fourteenth Amendment), or for any other reason in which the federal courts as tribunals for enforcing the Constitution—viewed as a charter of liberty rather an an invitation to the federal courts to bring the whole business of the states under their wing—have an interest. The only federal question in this case is whether breaches of public employment contracts are constitutional torts litigable in federal court under 42 U.S.C. § 1983. Once that threshold is crossed, all that is left to be discussed—all the court does discuss—is whether the school board broke is contract with Vail under Illinois law. If ever a decision gratuitously displaced state by federal jurisdiction, it is this decision.

I do not submit with as good a grace as my brethren to the tyranny of the syllogism. We can break the chain of reasoning at any of three links. We can hold that the interest created by a contract between a school board and a non-academic employee for a short fixed term is not "property" within the meaning of the Fourteenth Amendment; that a simple breach of contract does not "deprive" the employee of his right; or that there was no denial of due process of law.

Although the word "property" was broadly understood in the eighteenth century—Madison wrote in 1792 that it "embraces everything to which a man may attach a value and have a right," *Essay on Property*, in 6 Madison, Writings 101 (Hunt ed. 1906)—the due process clause of the Fifth Amendment used the word in a narrower sense and assigned its broader connotations to "life" and "liberty." Madison wrote that a man "has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects

on which to employ them." *Id.* Madison would not have regarded a simple breach of contract as a deprivation of property in the exalted sense in which he was using the term and he could not have thought it a deprivation of property in the narrower lawyer's sense, since in the eighteenth century, as today, contract rights and property rights were distinct. See 2 Blackstone, Commentaries on the Laws of England 442-70 (1766); 3 *id.* at 153-66 (1768). The Constitution distinguishes them explicitly, as one can see by comparing the contracts clause in Article I, section 10, with the due process and just compensation clauses of the Fifth Amendment. And if property means the same thing in the due process and just compensation clauses, a contract right cannot possibly be a property right, because the government does not have to pay just compensation for breaking a contract.

Until the Fourteenth Amendment was enacted there were few decisions interpreting the due process clause of the Fifth Amendment, and none dealt with the status of a mere contract right. There is no basis for thinking that the framers of the Fourteenth Amendment, in applying the due process clause of the Fifth Amendment verbatim to state action, wanted to give "property" a brand new meaning. Of course many Fourteenth Amendment due process cases have involved "liberty of contract", but that is a different animal from specific contract rights. If the State of Illinois forbade Mr. Vail to work as a football coach it would be interfering with his liberty of contract, cf. *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897)—that is, with property in the Madisonian sense—but that is not what it did, which is why cases like *Allgeyer* and like *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976), are irrelevant. Not even in the palmiest days of liberty of contract was it thought that a state infringed that liberty by breaking a contract with one of its employees or suppliers. See *Hartigan v. Board of Regents*, 49 W. Va. 14, 38 S.E. 698 (1901). The spirit of those times is well captured by a statement made by the Supreme Court of Tennessee in reference to the most famous public school teacher in

American history: "in dealing with its own employees engaged upon its own work, the state is not hampered by the limitations of . . .the Fourteenth Amendment to the Constitution of the United States." *Scopes v. State*, 154 Tenn. 105, 112, 289 S.W. 363, 365 (1927).

Perry v. Sindermann, 408 U.S. 593, 599, 601-02 (1972), is often thought to have raised a contract right to the level of a constitutional property right. Its companion case, *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972), held that if a state college teacher had no right under state law to continued employment he had no property right under the due process clause. But Sindermann alleged that he had an implicit right to tenure under state law, and the Court remanded the case for a trial of that allegation.

No doubt the Court believed that if Sindermann had tenure under state law he could not be discharged without due process of law, though this was assumed rather than argued. But the Court did not thereby equate contract rights with property rights having their source in contracts. Sindermann "alleged that [his interest in continued employment at Odessa Junior College], though not secured by a formal contractual *tenure* provision, was secured by a no less binding understanding fostered by the college administration. In particular, [he] alleged that the college had a de facto *tenure* program, and that he had *tenure* under that program." 408 U.S. at 599-600 (emphasis added). The important thing was not that a contract was alleged to have been broken but that tenure—arguably a form of property, a form having its source, as much property has its source, in contract—was alleged to have been destroyed.

A contract that gives a teacher the right to be employed till he retires is special, for unless he is old or rich the present value of his tenure right is probably his biggest asset. The Supreme Court, in dealing with recipients of welfare benefits, had held before *Sindermann* that statutory entitlements of indefinite duration have enough attributes of con-

ventional property to be protected by the due process clause. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970). *Sindermann* and the welfare cases extend to individuals who lack substantial assets of a conventional sort the protection of the due process clause for the unconventional assets they have.

The present case involves a two-year implied contract that when terminated had only one year to run. It is true that the difference between term and tenure contracts is one of degree and that if a teacher had only one year to go to retirement his stake in his tenure contract would be no greater than Vail's. But this is only to say that some contract rights are worth more than some property rights; it does not eliminate the distinction between tenure as property and a mere contract right. It is also true that *Hostrop v. Board of Junior College Dist. No. 515*, 471 F.2d 488, 494 (7th Cir. 1972), extended *Sindermann* to term employment contracts. But it did so uncritically, without discussion of the distinction I have just noted; and since, like *Roth* and *Sindermann*, it involved a teacher rather than an athletic coach, it is distinguishable from the present case by reference to a long history of judicial solicitude for the interests of teachers—especially college teachers, the plaintiffs in *Roth*, *Sindermann*, and *Hostrop*.

Daniel Webster argued to the Supreme Court in the *Dartmouth College* case that "professors have freeholds in their offices; subject only to be removed, by the trustees . . . for good cause. . . No description of private property has been regarded as more sacred than college livings. They are the estates and freehold of a most deserving class of men. . . ." *Trustees of Darmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 583-84 (1819). See also *Hartigan v. Board of Regents*, *supra*, 49 W. Va. at 30-60, 38 S.E. at 709-18 (dissenting opinion). The idea that teachers have a special claim to judicial protection now goes by the name of academic freedom, "a concept fashioned from other constitutional rights, including the First Amendment and due

process rights of faculty to avoid censure for the views they teach and espouse." *Gray v. Board of Higher Educ., City of N.Y.*, 692 F.2d 901, 909 (2d Cir. 1982); see also cases cited at *id.*, n. 14; *Martin v. Helstad*, 699 F.2d 387, 391 (7th Cir. 1982); *id.* at 392-99 (concurring opinion). Most cases (again including *Roth*, *Sindermann*, and *Hostrop*) in which teachers have mounted constitutional challenges to their dismissal have involved alleged deprivations of freedom of speech—one of the liberties protected by the due process clause—as well as of a property right in continued employment. Although the Supreme Court in *Roth* and *Sindermann*, and a panel of this circuit in *Hostrop*, treated these as distinct rights, this may have been—though I admit I am speculating—because protection against arbitrary dismissal was thought necessary to prevent infringements of freedom of academic speech that would be too difficult to prove. The dismissal of a football coach does not endanger academic freedom.

The First Circuit's recent decision in *Casey v. DePetrillo*, 697 F. 2d 22 (1st Cir. 1983) (per curiam), which upheld the dismissal of a public school employees' section 1983 suit against local school officials, shows the difference between this case and *Hostrop*. The suit alleged that "the defendants injured [the plaintiffs] by breaching the plaintiffs' employment contracts," *id.* at 23, and was thus, "at bottom, a simple action for breach of contract for which the state provides a complete and adequate remedy" and which therefore "failed to state a claim for relief under federal law," *id.* There is no indication that the plaintiffs were academic employees with tenure – but Mr. Vail is not an academic employee with tenure either.

But if *Hostrop* is indistinguishable from the present case, then let us overrule *Hostrop*, a decision of this court, not of the Supreme Court. The Supreme Court has never equated tenure with nontenure contracts; and we are not obliged to read Supreme Court decisions broadly in order to reach foolish results. I plead guilty, though, to Judge Eschbach's

charge that I am "superimposing a unifying doctrinal thread onto the cases which would explain their outcomes in a principled fashion." I had understood this to be my job

Suppose all this is wrong, however, and Vail's contract really did give him a Fourteenth Amendment property right; still, he would have a Fourteenth Amendment claim only if the breach of contract "deprived" him of that right. Whether it did depends on the precise content of the right. "Property interests...are created *and their dimensions are defined* by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth, supra*, 408 U.S. at 577 (emphasis added). So we must determine exactly what right Vail's contract gave him under the laws of Illinois.

An employee complaining of a breach of an employment contract under Illinois law has a right to damages for the breach, but not a right to specific performance of the contract, *Zannis v. Lakeshore Radiologists, Ltd.*, 73 Ill. App. 3d 901, 392 N.E. 2d 126 (1979), to reinstatement in other words; and Judge Eschbach points out that this principle was applied to nontenured teachers in *Bressler v. Board of Educ.*, 69 Ill. 2d 191, 370 N.E.2d 1050 (1977). As Holmes, writing of contract rights in general, said, "The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses." The Common Law 301 (1881). Vail never had a right to performance of the contract – a right to force the school board to keep him. He had only a right to performance *or* damages for nonperformance. The state would have deprived Vail of this disjunctive right only if it had refused to pay him damages for breaking its contract, and it has not refused; if he can prove that the contract was broken, the state through its court system will give him damages. See Ill. Rev. Stat. 1981, ch. 122, § 10-2; *Jewell v. Board of Educ.*, 19 Ill. App. 3d

1091, 312 N.E.2d 659 (1974); *Piper v. Board of Trustees*, 99 Ill. App. 3d 752, 426 N.E.2d 262 (1981); cf. *Powell v. Jones*, 56 Ill. 2d 70, 77-78, 305 N.E.2d 166, 169-70 (1973).

I am not arguing, as I may seem to be, that Vail failed to exhaust his remedies under state law. I accept that exhaustion normally is not required in section 1983 cases, and is not required here. A requirement of exhaustion would mean that Vail had to sue first in state court but if he lost he could then sue in federal court, like a state prisoner seeking federal habeas corpus. This would assume, however, that the state had deprived Vail of a constitutionally protected interest such as property, and that the only question was whether he could complain of that deprivation in federal court before seeing what relief he could get in state court. But since the right Vail was allegedly deprived of is just a right to a particular remedy – damages – he cannot complain that he has been deprived of that right unless the state fails to provide him with the remedy, and if there is no deprivation, there is no cause of action under section 1983. As there is no suggestion that the State of Illinois does not provide remedies in its courts for breaches of contracts with public school employees, I do not see how we can conclude that Vail has been deprived of any right given him by the state, or even that he has alleged such a deprivation.

Concurring in *Parratt v. Taylor*, 451 U.S. 527 (1981), Justice Stewart – the author of *Roth* and *Sindermann* – asked hypothetically whether "damages to a person's automobile resulting from a collision with a vehicle negligently operated by a state official" would be "a deprivation of property within the meaning of the Fourteenth Amendment," and answered that it would not be. 451 U.S. at 544-45. He could not have meant that the automobile was not property; he must have meant that negligent damage to it would not be a deprivation of property. Justice Powell's concurring opinion in the same case explains why: "under state law no remedy other than tort law protects property from interferences caused by the negligence of others. . . .[T]herefore, . . . the enjoyment

of property free of negligent interference is not sufficiently 'guaranteed' by state law to justify a due process claim based on official negligence." *Id.* at 549 n. 7. Just as the State of Illinois has not promised to protect Vail's property from negligent harm, but only to give him a damages remedy for the harm, it did not promise that the school board would employ him for the full term of his contract but only that he would have a damages remedy for breach of contract if it did not. There is no suggestion that the state means to renege on that promise.

This analysis reinforces my previous point that a contract right, as such, is not property. We infer the existence of a property right from the remedies the law gives to protect it. A right protected by an injunction, by specific performance, or by criminal penalties is a property right. But if the only remedy the law provides for some wrong is damages, we speak of a liability rule rather than of a property right. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1092, 1125 (1972). You have a property right against (most) deliberate takings of your car but not against its being demolished in an accidental collision with another car, even if the driver of that car is negligent, and you are not; your only right is to damages. No more has the employee under an employment contract the right to ask a court of equity or the criminal justice authorities to prevent a breach of the contract. His only right, like that of a victim of negligence, is to have the employer held liable for damages, and it is not a property right.

But even if Vail had a property right and the state deprived him of it, his claim fails because there was no denial of due process. Due process does not always require that you get a hearing before rather than after your property is taken. *Sutton v. City of Milwaukee*, 672 F.2d 644 (7th Cir. 1982). To hold that the deprivation in this case required a hearing in advance is to require the states in the name of the Constitution to set up special tribunals to adjudicate all

contract disputes (at the very least all employment-contract disputes) that might result in a state agency's terminating a contract. Vail could have sued the school board in state court for breach of contract, as I have already pointed out; and if he had done so he would have received a hearing that satisfied the requirements of due process.

What indeed would be the purpose of a "predeprivation" hearing in this case? Since state law allows the school board to break its contracts with probationary employees such as Vail for any reason or no reason, provided only that it is willing to pay the employee's damages, the employee has little to gain from such a hearing. It is not as if Vail had been fired for cause, and there was a question whether he really had given cause; then a hearing might help. The only hearing that could help him would be a hearing for the purpose of adjudicating that there was a breach of contract and computing his damages if a breach was found. He can get that kind of hearing in state court by suing for breach of contract; he cannot get it from the school board.

In deciding what process is due, and specifically whether a predeprivation hearing is required or whether a postdeprivation hearing is good enough, the courts consider as one factor the gravity of the deprivation complained of. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Sutton v. City of Milwaukee*, *supra*, 672 F.2d at 645-46. But it borders on the melodramatic to describe what happened to Vail, in Judge Eschbach's words, as "termination of a person's livelihood...." Vail was fired in breach of a contract. The wrong done to him was a type of wrong that traditionally has not been thought so grievous that it cannot be adequately remedied by a suit for damages. That is all he is suing for in federal court. As long as he can seek damages in a suit in a state court that is not alleged to harbor prejudices against this class of litigants or to follow unfair or inadequate procedures, I cannot see that the state has treated him in the arbitrary fashion that one associates with

denying a person due process of law.

In suggesting that common law remedies may, in some cases of alleged deprivation of property rights, provide all the process that is due, I am not making a new argument. *Parratt v. Taylor*, 451 U.S. 527 (1981), held that state prison officers had not denied a prisoner due process by negligently losing his hobby kit. He had an adequate common law remedy, which was all the process that was due him since "the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the state to follow established state procedure." *Id.* at 543. In this case too, any deprivation of property was due to the defendants' "unauthorized failure . . . to follow established state procedures" regarding the honoring of contracts, and the plaintiff had an adequate common law remedy, as is shown by the fact that the district court awarded Vail just his common law contract damages. In contrast, in *Logan v. Zimmerman Brush Co.*, 102 S. Ct. 1148 (1982), the common law remedy was inadequate. *Id.* at 1158.

I admit that the facts of *Parratt* are very different from those of this case; and maybe Judge Wood is right in thinking that *Logan* has clipped *Parratt's* wings. There is undoubted tension between *Parratt* and the case that made 42 U.S.C. § 1983 what it is today. *Monroe v. Pape*, 365 U.S. 167 (1961). *Monroe* held that police brutality was actionable under section 1983 regardless of what tort remedies the victim might have against the police under state law. ("The complaint alleges that 13 Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. It further alleges that Mr. Monroe was then taken to the police station and detained on 'open charges' for 10 hours, while he was interrogated about a two-day-old murder, that he was not taken before a magistrate, though one was accessible, that he was not permitted to call his family

or attorney, that he was subsequently released without criminal charges being preferred against him. It is alleged that the officers had no search warrant and no arrest warrant . . . ." *Id.* at 169). Though it is too soon to know where the line will be drawn between *Parratt* and *Monroe*, or even whether both decisions will endure, it is at least possible that simple breaches of contract (assuming, as I do not, that they automatically cause "deprivations" of "property") will be held to fall on the *Parratt* side. When *Monroe* was decided, state tort remedies against police officers were considered worthless. See Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493 (1955). That was a reason for ignoring them in deciding what process was due. My brethren do not question the effectiveness of state contract remedies.

Another basis for distinguishing *Monroe* and *Parratt* is suggested in *Duncan v. Poythress*, 657 F.2d 691, 704-05 (5th Cir. 1981), cert. granted, 102 S. Ct. 1426 –1982), and in Judge Wood's decision for a panel of this circuit in *Wolf-Lillie v. Sonquist*, 689 F.2d 864 (7th Cir. 1983): *Parratt* applies where the only violation of the due process clause of the Fourteenth Amendment is a denial of due process in its original sense of proper procedure, *Monroe* where the violation involves a breach of one of the guarantees of the Bill of Rights (in *Monroe* itself, the Fourth Amendment, see 365 U.S. at 171) that have been applied to the states through the due process clause of the Fourteenth Amendment. 689 F.2d at 871-72. The Bill of Rights protects the interests of unpopular or vulnerable groups and it is natural to be concerned about the adequacy of their legal remedies. Football coaches do not comprise such a group and Vail makes no claim under the Bill of Rights.

No doubt *Parratt* can be read even more narrowly than I have done—maybe so narrowly as not to affect this case at all. There is an argument for reading Supreme Court decisions narrowly: it is a busy court and cannot foresee and be taken to approve every potential application of its opin-

ions if they are read broadly. But why my brethren choose to read a recent Supreme Court decision (*Parratt)* narrowly, and on older one (*Sindermann)* broadly, eludes me. If *Sindermann* were construed as narrowly as Judge Wood's and Judge Eschbach's opinions in this case construe *Parratt*, then *Sindermann* clearly would not be controlling either.

If my brethren think *Parratt* a sport, they should say so, rather than try to distinguish it on factitious grounds, such as that it applies only to negligent deprivations of property, as argued by Judge Eschbach. That reading of *Parratt* is inconsistent with several recent decisions of this court, including Judge Wood's decision of a few weeks ago in *Wolf-Lillie*. That was not a case of negligent deprivation. Nor was *Ellis v. Hamilton*, 669 F.2d 510 (7th Cir. 1982), which *Wolf-Lillie* cites for the proposition that *Parratt* "requires federal courts to consider the adequacy and availability of remedies under state law before concluding that a deprivation of life, liberty, or property violates due process of law." 689 F.2d at 871. *Wolf-Lillie* involved "a pervasive pattern of executing invalid writs of restitution" by Sheriff Sonquist's deputies with his knowledge. *Id.* at 870. Judge Wood did not call this conduct "negligent." He could not have; the conduct was intentional tortfeasing.

Nor can *Parratt* be easily distinguished on the ground that, in Judge Eschbach's words, the conduct of the defendants here was not merely "ministerial" or "mindless." Any deprivation of Vail's right resulted from the isolated action of a single school board; the state was not implicated. That is another possible difference between this case and *Logan v. Zimmerman Brush Co., supra*, where in distinguishing *Parratt* the Supreme Court said that "Logan is challenging not the Commission's error [the Illinois Fair Employment Practices Commission, corresponding to the school board in this case], but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards." 102 S. Ct. at 1158. True, the members of the school board in this case are more responsible offi-

cials than the prison employees who lost the hobby kit in *Parratt*. But in *Flower Cab Co. v. Petitte*, 685 F.2d 192 (7th Cir. 1982), this court applied the principle of *Parratt* to a property deprivation by Chicago's Commissioner of Consumer Services. If Judge Eschbach is entitled to ignore *Petitte*, not to mention *Wolf-Lillie* and *Ellis*, I do not see why I should feel bound by *Hostrop*.

Furthermore, while some breaches of contract are intentional and some others are negligent, nothing in the law of contracts requires that a breach be either intentional or negligent to be actionable. A garden-variety breach of contract is even less culpable than the garden-variety tort involved in *Parratt*. Breach of contract is a strict-liability concept. Outside the limited shelter given by impossibility and related doctrines, a party who breaks his contract is liable for the consequences of the breach even if it was due to events completely beyond his control—even if it was involuntary, and so in a sense "mindless." If *Parratt* confines the victim of negligent conduct to his remedies (provided they are adequate) under state law, it should likewise confine the victim of unavoidable conduct.

But forget *Parratt*, and my basic point remains: in a case of this sort, where one is about as far away as one can get from the gross police misconduct alleged in *Monroe v. Pape*, the requirements of due process are satisfied by the remedies that the state provides in its courts for breaches of contract by its school boards. And this is but one of my grounds for arguing that Vail has no right to relief under 42 U.S.C. § 1983; the others, it will be recalled, are that there is no property right at stake in this case and that in any event there has been no *deprivation* of such a right. I do not argue that any of these grounds possesses apodictic certainty but at least they show that the result in this case is not predestined by existing case law. The Supreme Court has not decided the question in this case. We do that Court a disservice to apply its 1972 decisions in *Roth* and *Sindermann* to the very different facts of this case, ignoring all that

has happened in the law relevant to section 1983 since then, reaching a result that is contrary to every principle of federalism and good sense, and putting the blame on the Court. I have tried very hard but without success to think of a reason why a football coach should be allowed to litigate his contract claim against a school board in a federal district court. I get no help in this endeavor from being told by Judge Eschbach that this case is about the "termination of a person's livelihood," or by Judge Wood that football coaches "are generally not second class members of a balanced school program." We are witnessing the trivialization of the Constitution. I regret almost more than I can say that my brethren's method of interpreting precedet has led them to take another step on the road whose terminus is the displacement of the whole of state law into the federal courts.

EXHIBIT B

(No. 81-2116)

JESSE A. VAIL, Plaintiff, v. BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART, Defendants.

Opinion filed January 13, 1982.

United States District Court for the Central District of Illinois, Danville Division. The Hon. Harold A. Baker, Judge, presiding.

Marc J. Ansel, of Erwin, Martinkus, Cole & Ansel, Ltd., of Champaign, for plaintiff.

S. Craig Smith, of Dillavou, Overaker, Asher & Smith, of Paris, for defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, MEMORANDUM OPINION, AND FINAL ORDER

This is an action for damages and for declaratory and injunctive relief brought under the provisions of 42 U.S.C. §1983. The plaintiff, Jesse A. Vail, was an employee of the Defendant Board of Education of Paris Union School District No. 95 during the school term 1980-1981. The plaintiff claims that the Board of Education, acting under color of state law, terminated the plaintiff's contract of employment without cause, without notice, and without hearing in violation of plaintiff's right to due process of law under the fourteenth amendment. The plaintiff also raises pendent claims under state law. Jurisdiction is vested in the court under the provisions of 28 U.S.C. §1343 (3).

FINDINGS OF FACT

I.

In June, 1980, the Defendant Board of Education sought to retain the services of a new athletic director and head

football coach. At that time the plaintiff was a resident of Joliet, Illinois and was employed as supervisor of recreation and physical education for the Stateville Correctional Center in Joliet, Illinois under the auspices of the Department of Corrections of the State of Illinois. The plaintiff was a certified physical education teacher with over twenty years of teaching and coaching experience at the high school or college level.

On June 15, 1980, a search committee, representatives of the Defendant Board of Education, Board members Robert Wallace and Dyke Davis, Superintendent James Cherry, and Paris High School Principal Dominic Marchiando, visited with the plaintiff at his residence in Joliet, Illinois, to discuss his employment as athletic director, district physical education coordinator, and head football coach of the school district. Prior to going to plaintiff's home, the Board representatives had held a breakfast meeting with the plaintiff and visited his place of employment at the Stateville Correctional Center.

In addition to talking about the nature of the duties the plaintiff would be expected to perform and his salary, discussion between the search committee and the plaintiff was also had concerning the length of the term of the plaintiff's proposed contract. All the witnesses agree that the plaintiff was concerned as to how long it would take for a new athletic director to correct the deficiencies that then existed in the Paris School District's athletic program.

The witness Davis recalled that discussion was had in the search committee concerning the length of the term of the contract that could be proposed to plaintiff. The plaintiff was concerned about the term of the contract and said that that would be a factor in his deciding whether to accept the position if it was offered. The search committee said that the length of the term of the contract would be a matter decided by the full Board and that the committee could make no commitment beyond the one year statutory term of a prob-

ationary teacher.

On June 24, 1980, the Board met in special session together with the superintendent, James Cherry, and the high school principal, Dominic Marchiando. At the meeting the Board unanimously agreed to offer the plaintiff a contract of employment as athletic director and head football coach. The witness Davis recounts that at this meeting discussion was had concerning the term of the contract and Davis testified it was the concensus of the Board that it would assure the plaintiff of two years in his position. Board member McHenry has the same recollection.

It was the Board's intention to renew the one year contract it offered the plaintiff at the end of the first year. The witness Davis testified that the superintendent, Dr. Cherry, was told to make that kind of an offer to the plaintiff.

The witness Davis is confident that discussion was had by the search committee in Joliet about a two year contract and explanation was made to the plaintiff that, while the Board could not offer him more than a one year contract, it could assure him of extending the contract for a second year.

The position was offered to the plaintiff by Dr. James Cherry and the plaintiff accepted. He traveled to Paris, executed a written contract, and in due course entered into the performance of his duties.

On March 2, 1981, the Board met in public session and voted 3 to 2 not to renew plaintiff's contract for the ensuing year. Plaintiff was not given any reason for his termination, nor was he afforded a hearing in which he could reply to any purported cause for his termination. The meeting at which the termination of the plaintiff's contract was voted upon was a stormy one. Two of the members, Davis and McHenry, voted against terminating the plaintiff's contract but the three other Board members present, Parks, Fox and Rinehart, voted not to renew the contract. Davis and McHenry reminded the other Board members that a commit-

ment had been made to the plaintiff to extend his contract for two years. The other Board members denied that at the meeting of March 2, 1981, and denied it in their testimony and asserted that no such commitment had been made.

I credit the testimony of the witnesses Davis and McHenry and believe that their recollection of the representations made to the plaintiff is correct and that recollections of the other Board members and the testimony of Dr. James Cherry and Dominic Marchiando is not correct. I am led to that conclusion not only by the demeanor of the witness Davis while he testified and the reasonableness of his testimony considered in the light of the case, but also by the other Board members and administration who testified that they could not recall that Davis and McHenry took a very firm position with the Board that the Board had committed itself to a two year contract. That testimony by the other Board members and administration seems incredible to me in light of the emotion and personal feelings that were evident at the March 2, 1981 meeting. The superintendent, Dr. Cherry, when he testified remembered that the plaintiff when negotiating had five essential points in connection with his contract with the school district. The first point was security.

Under all the circumstances of the case it is far more credible and, I find more likely true than not true, that the Board made a commitment to the plaintiff to extend his contract for a second year if he would accept the job in Paris. The Board may have become dissatisfied with the plaintiff's performance and decided for those reasons, whatever they might have been, to discharge him. Nothing appears in the record, however, which would indicate a cause for terminating the plaintiff's contract other than general dissatisfaction with the results obtained in the Paris sports program while the plaintiff was athletic director.

I find it probable and believe in the light of all the circumstances in the case that the Board did instruct its superintendent to tell the plaintiff that the Board would ex-

tend his contract for an additional year at the conclusion of the first year. This seems reasonable in light of the emphasis that was placed on the term of contract in the pre-employment discussion between Dr. Cherry and the plaintiff, and Dr. Cherry's recollection that the plaintiff had asked about a guarantee of renewal. [Dr. Cherry's trial testimony that the plaintiff had not asked about a guarantee of renewal was impeached by his prior statement in a deposition taken in the course of preparation of the case.]

II.

The plaintiff also asserts that in the course of the Board's discharging him he was defamed. Members of the public at the meeting demanded to know why the plaintiff was being discharged and members Davis and McHenry asked the Board to state reasons. The Board refused to state reasons but Dr. Davis did say publicly that there was some talk of the plaintiff "shuffling funds." The plaintiff at the public meeting reminded the Board that he had been promised a two year contract and explained that the "shuffling funds" that had been mentioned involved transferring athletic funds from one account to another with the authority and knowledge of the superintendent.

There is nothing in the evidence that would indicate the plaintiff was charged with dishonesty or wrongdoing, and I am not persuaded that it is more probably true than not that he suffered a defamation which impinged on his ability to find new employment. He did secure new employment in Mundelein, Illinois, and there is no testimony that he had any difficulty in finding new employment because of any statement that had been made about him or his character in the course of his discharge by the Paris Board.

III.

Nothing in the evidence tends to support the plaintiff's theory that there was a conspiracy among the individual

Board defendants to defraud the plaintiff or to deny him his constitutional liberties. There is a failure of proof on those claims.

CONCLUSIONS OF LAW

In the simplest terms, the issue in this case is whether the plaintiff had a two year or a one year contract. It is apparent from the evidence that the plaintiff had a commitment for two years of employment by the defendant school board.

In *Perry v. Sindermann*, 408 U.S. 593, 601 (1971), the Supreme Court recognized that a non-tenured teacher might have a property interest in re-employment although that interest was not formalized in writing. "Explicit contractual provisions," the Court noted, "may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstance.' " Here the Defendant Board made a commitment to extend the plaintiff's contract for an additional year and then proceeded to deny him that property interest without notice, without hearing, and without stated cause. Since the Defendant Board acted under the color of state law, it worked a deprivation of property without due process of law and a violation of 42 U.S.C. §1983 and the plaintiff has a right to recover consequent damages.

Of the stipulated economic damages the plaintiff claims, $3,800.00 is for additional living expenses. There is no evidence to support the plaintiff's assertion that these expenses would not have been incurred by him for living had he remained in his position in Paris, Illinois. Accordingly, I conclude that the claim for additional living expenses is not supported by the evidence as resulting from the breach of contract by the defendant. Accordingly, the stipulated economic damages of the plaintiff which are allowable are $19,850.99.

Plaintiff also asserts pendent claims involving interpretation of state law and the Constitution of the State of Illinois.

In light of the findings and conclusions of the court and the remedy afforded the plaintiff, the court declines to consider the pendent claims under Illinois law. *See Coe v. Bogart*, 519 F. 2d 10 (6th Cir. 1975).

Plaintiff also seeks injunctive relief from the court and asks that he be reinstated in his position as athletic director. The plaintiff has an adequate remedy at law in money damages for the breach of contract and denial of property right that has been worked on him. The court therefore declines to grant the requested injunctive relief.

IT IS THEREFORE ORDERED that on Count I of the complaint the plaintiff, Jesse A. Vail, have and recover of the defendant, Board of Education of Paris Union School District No. 95, the sum of Nineteen thousand eight hundred fifty and 99/100 Dollars ($19,850.99) and costs of suit.

IT IS FURTHER ORDERED that on Count II judgment enter in favor of the defendants and against the plaintiff.

IT IS FURTHER ORDERED that Counts III, IV, V, and VI of the complaint are dismissed without prejudice.

IT IS FURTHER ORDERED that judgment enter in favor of the defendants and against the plaintiff on Count VII.

IT IS FURTHER ORDERED that Count VIII is dismissed without prejudice.

ENTERED this 13th day of January, 1982.

/s/ Harold A. Baker
Harold A. Baker
United States District Judge

EXHIBIT C

(No. 81-2116 – Motion to Dismiss denied.)

JESSE A. VAIL, Plaintiff, v. BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART, Defendants.

Order filed June 5, 1981.

In the United States District Court for the Central District of Illinois, Danville Division. The Hon. Harold A. Baker, Judge, presiding.

Marc J. Ansel, of Zimmerly, Dodd, Ansel & Stout, P.C., of Champaign, for plaintiff.

S. Craig Smith, of Dillavou, Overaker, Asher & Smith, of Paris, for defendants.

ORDER

This is a civil action in which the plaintiff alleges violations of due process under the Fourteenth Amendment of the United States Constitution and Article I, § 2 of the Illinois Constitution of 1970, fraud, and breach of contract by the defendants. The plaintiff's complaint alleges that in 1980 the Board of Education of Paris Union School District No. 95 extended an offer to the plaintiff for employment to last at least two years. In reliance upon the board's extension of a two-year commitment, the plaintiff thereafter terminated his job with the Department of Corrections, with whom he had been employed for ten years, and relocated to Paris, Illinois. Although the plaintiff then signed a contract specifying a term of employment from July 15, 1980 to June 15, 1981, the plaintiff states that he was assured when he signed the contract that he would be employed until July 15, 1981.

On March 2, 1981, the defendant Board of Education voted against renewing the plaintiff's contract for an additional year. The plaintiff maintains that this decision was

made without cause and without notice and a hearing in violation of the plaintiff's rights to due process of law protected under the Fourteenth Amendment. In addition, the plaintiff states that at the time of this decision a member of the Board made statements in public regarding the plaintiff which implied that the plaintiff had engaged in wrongful conduct. Since the plaintiff was not afforded notice of these allegations and a hearing at which he could respond to these statements, the plaintiff asserts a violation of due process under the Fourteenth Amendment. State constitutional claims, allegations of fraud, and allegations of breach of contract are also contained in the plaintiff's complaint.

The defendants have moved to dismiss the plaintiff's complaint on the basis of a lack of subject matter jurisdiction. The defendants maintain that there exists no federal question jurisdiction under 28 U.S.C. § 1343 (3) since the plaintiff had no property interest in continued employment with the defendant school board which would entitle the plaintiff to due process protection. The defendants' position is based on their contention that the plaintiff was a probationary employee not entitled to the procedural safeguards of prior notice and a hearing before the decision to terminate his employment was made.

The plaintiff's complaint, however, does not state that the plaintiff was hired on a probationary basis, but rather that a definite commitment was made by the defendants to employ the plaintiff for at least two years. The Supreme Court in *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) recognized that a property interest might exist by virtue of "mutually explicit understanding that supports his claim of entitlement to the benefit," rejecting the notion that a property interest in continued employment must have a basis in explicit contractual or tenure provisions. Such "mutually explicit understandings" have been set forth in the plaintiff's complaint. Since the plaintiff's uncontroverted factual allegations must be accepted as true for the purpose of this motion to dismiss, *Stern v. United States Gypsum, Inc.*, 547 F.2d

1329, 1332 (7th Cir. 1977), the plaintiff has described sufficient facts indicating the existence of a property interest to withstand the defendants' motion to dismiss.

IT IS THEREFORE ORDERED that the defendants' motion to dismiss be, and hereby is, denied.

ENTER this 5th day of June, 1981.

/s/ Harold A. Baker
Harold A. Baker
United States District Judge

EXHIBIT D

(No. 81-2116 – Motion to Dismiss.)

JESSE A. VAIL, Plaintiff, v. BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART, Defendants.

Motion filed May 18, 1981.

In the United States District Court for the Central District of Illinois, Danville Division. The Hon. Harold A. Baker, Judge, presiding.

Marc J. Ansel, of Zimmerly, Dodd, Ansel & Stout, P.C., of Champaign, for plaintiff.

S. Craig Smith, of Dillavou, Overaker, Asher & Smith, of Paris, for defendants.

MOTION TO DISMISS FOR LACK OF JURISDICTION

Defendants, BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART, by and through their attorneys, Dillavou, Overaker, Asher and Smith, move the Court to dismiss this action, and, as grounds for such motion, the Defendants show that the Court has no jurisdiction over the subject matter of this action in that:

1. Plaintiff and all Defendants are citizens of the same state.

2. The matters set forth and alleged in the Complaint are insufficient to confer jurisdiction of the Court under the provisions of Title 28 of the United States Code.

3. The allegations of the Complaint attempt to circumvent jurisdictional requirements of this Court to bring the matter under provisions of the laws of the United States concerning federal question jurisdiction and are insufficient to confer

such jurisdiction.

WHEREFORE, the Defendants pray that the Court enter an order dismissing Plaintiff's Complaint with prejudice and for such other and further relief as may be proper in the premises.

BOARD OF EDUCATION
OF PARIS UNION SCHOOL
DISTRICT NO. 95,
TERRANCE C. PARKS,
CHARLES R. FOX and
BERNIE RINEHART,
Defendants

DILLAVOU, OVERAKER,
ASHER & SMITH

BY: /s/ S. Craig Smith
Their Attorney

EXHIBIT E

Constitution of the United States, Amendment 14, Section 1.

42 U.S.C. § 1983.

Chapter 122, Section 24-11, *Illinois Revised Statutes* (1981).

Chapter 122, Section 24-12, *Illinois Revised Statutes* (1981).

Fourteenth Amendment Constitution of the United States

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction therof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 42 – Public Health and Welfare, 42 United States Code § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,

suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Chapter 122, Section 24-11,
***Illinois Revised Statutes* (1981)**

24.11. Boards of education – Boards of school inspectors – Contractual continued service

§ 24-11. Boards of Education – Boards of School Inspectors – Contractual continued service. As used in this and the succeeding Sections of this Article, "teacher" means any or all school district employees regularly required to be certified under laws relating to the certification of teachers, "board" means board of directors, board of education or board of school inspectors, as the case may be, and "school term" means that portion of the school year, July 1 to the following June 30, when school is in actual session. This section and Sections 24-12 through 24-16 of this Article apply only to school districts having less than 500,000 inhabitants.

Any teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason therefor, by registered mail by the employing board at least 60 days before the end of such period. For the purpose of determining contractual continued service, the first probationary year shall be any full time employment from a date before November 1 through the end of the school year. If, however, a teacher has not had one school term of full-time teaching experience before the beginning of such probationary period, the employing board may at its option extend such probationary period for one additional school term by giving the teacher written notice by registered mail

at least 60 days before the end of the second school term of the period of 2 consecutive school terms referred to above. Such notice must state the reasons for the one year extension and must outline the corrective actions which the teacher should take to satisfactorily complete probation.

Any full-time teacher who is completing the first year of the probationary period described in the preceding paragraph, or any teacher employed on a full-time basis not later than January 1 of the school term, shall receive written notice from the employing board at least 60 days before the end of any school term whether or not he will be re-employed for the following school term. If the board fails to give such notice, the employee shall be deemed reemployed, and not later than the close of the then current school term the board shall issue a regular contract to the employee as though the board had reemployed him in the usual manner.

Contractual continued service shall cease at the end of the school term following the 70th birthday of any teacher, and any subsequent employment of such a teacher shall be on an annual basis.

Contractual continued service shall continue in effect the terms and provisions of the contract with the teacher during the last school term of the probationary period, subject to this Act and the lawful regulations of the employing board. This Section and succeeding Sections do not modify any existing power of the board except with respect to the procedure of the discharge of a teacher and reductions in salary as hereinafter provided. Contractual continued service status shall not restrict the power of the board to transfer a teacher to a positiion which the teacher is qualified to fill or to make such salary adjustments as it deems desirable, but unless reductions in salary are uniform or based upon some reasonable classification, any teacher whose salary is reduced shall be entitled to a notice and a hearing as hereinafter provided in the case of certain dismissals or removals.

The employment of any teacher in a special education program authorized by Section 14-1.01 through 14-14.01, or a joint educational program established under Section 10-22.31a, shall be under this and the succeeding Sections of this Article, and such employment shall be deemed a continuation of the previous employment of such teacher in any of the participating districts, regardless of the participation of other districts in the program. Any teacher employed as a full-time teacher in a special education program in which 2 or more school districts participate for a probationary period of 2 consecutive years shall enter upon contractual continued service in each of the participating districts, subject to this and the succeeding Sections of this Article, and in the event of the termination of the program shall be eligible for any vacant position in any of such districts for which he is qualified.

Chapter 122, Section 24-12,
***Illinois Revised Statutes* (1981)**

24-12. Removal or dismissal of teachers in contractual continued service

§ 24-12. Removal or dismissal of teachers in contractual continued service. If a teacher in contractual continued service is removed or dismissed as a result of a decision of the board to decrease the number of teachers employed by the board or to discontinue some particular type of teaching service, written notice shall be given the teacher by registered mail at least 60 days before the end of the school term, together with a statement of honorable dismissal and the reason therefor, and in all such cases the board shall first remove or dismiss all teachers who have not entered upon contractual continued service before removing or dismissing any teacher who has entered upon contractual continued service and who is legally qualified to hold a position currently held by a teacher who has not entered upon contractual continued service. As between teachers who have

entered upon contractual continued service, the teacher or teachers with the shorter length of continuing service with the district shall be dismissed first unless an alternative method of determining the sequence of dismissal is established in a collective bargaining agreement or contract between the board and a professional faculty members' organization and except that this provision shall not impair the operation of any affirmative action program in the district, regardless of whether it exists by operation of law or is conducted on a voluntary basis by the board. Any teacher dismissed as a result of such decrease or discontinuance shall be paid all earned compensation on or before the third business day following the last day of pupil attendance in the regular school term. If the board has any vacancies for the following school term or within one calendar year from the beginning of the following school term, the positions thereby becoming available shall be tendered to the teachers so removed or dismissed so far as they are legally qualified to hold such positions. Whenever the number of honorable dismissal notices based upon economic necessity exceeds 5, or 150% of the average number of teachers honorably dismissed in the preceding 3 years, whichever is more, then the board shall hold a public hearing on the question of the dismissals. Following the hearing and board review the action to approve any such reduction shall require a majority vote of the board members.

If a dismissal or removal is sought for any other reason or cause, including those under Section 10-22.4, the board must first approve a motion containing specific charges by a majority vote of all its members. Unless the teacher within 20 days requests in writing of the board that no hearing be scheduled, the board shall schedule a hearing on those charges before a disinterested hearing officer on a date no less than 30 nor more than 60 days after the enactment of the motion. Written notice of such charges shall be served upon the teacher at least 21 days before the hearing date. Such notice shall contain a bill of particulars. The secretary

of the school board shall forward a copy of the notice to the State Board of Education. Within 10 days after receiving this notice of hearing, the State Board of Education shall provide a list of 5 prospective, impartial hearing officers. Each person on the list must be accredited by a national arbitration organization. No one on the list may be a resident of the school district. The Board and the teacher or their legal representatives within 5 days shall alternately strike one name from the list until only one name remains. The teacher shall have the right to proceed first with the striking. The State Board of Education shall promulgate uniform standards and rules of procedure for such hearings. The per diem allowance for the hearing officer shall be paid by the State Board of Education and may not exceed $250. The hearing officer shall hold a hearing and render a final decision. The hearing shall be public at the request of either the teacher or the board. The teacher has the privilege of being present at the hearing with counsel and of cross-examining witnesses and may offer evidence and witnesses and present defenses to the charges. The hearing officer may issue subpoenas requiring the attendance of witnesses and, at the request of the teacher against whom a charge is made or the board, shall issue such subpoenas, but the hearing officer may limit the number of witnesses to be subpoenaed in behalf of the teacher or the board to not more than 10. All testimony at the hearing shall be taken under oath administered by the hearing officer. The hearing officer shall cause a record of the proceedings to be kept and shall employ a competent reporter to take stenographic or stenotype notes of all the testimony. The costs of the reporter's attendance and services at the hearing shall be paid by the State Board of Education. Either party desiring a transcript of the hearing shall pay for the cost thereof. If in the opinion of the board the interests of the school require it, the board may suspend the teacher pending the hearing, but if acquitted the teacher shall not suffer the loss of any salary by reason of the suspension.

Before setting a hearing on charges stemming from causes that are considered remediable, a board must give the teacher reasonable warning in writing, stating specifically the causes which, if not removed, may result in charges. The hearing officer shall, with reasonable dispatch, make a decision as to whether or not the teacher shall be dismissed and shall give a copy of the decision to both the teacher and the school board. The decision of the hearing officer is final unless reviewed as provided in Section 24-16 of this Act. In the event such review is instituted, any costs of preparing and filing the record of proceedings shall be paid by the board.

If a decision of the hearing officer is adjudicated upon review or appeal in favor of the teacher, then the trial court shall order reinstatement and shall determine the amount for which the board is liable including but not limited to loss of income and costs incurred therein.

Any teacher who is reinstated by any hearing or adjudication brought under this Section shall be assigned by the board to a position substantially similar to the one which that teacher held prior to that teacher's suspension or dismissal.

If, by reason of any change in the boundaries of school districts, or by reason of the creation of a new school district, the position held by any teacher having a contractual continued service status is transferred from one board to the control of a new or different board, the contractual continued service status of such teacher is not thereby lost, and such new or different board is subject to this Act with respect to such teacher in the same manner as if such teacher were its employee and had been its employee during the time such teacher was actually employed by the board from whose control the position was transferred.

Office - Supreme Court, U.S.
FILED
NOV 17 1983
ALEXANDER L. STEVAS,
CLERK

No. 83 - 87

In The

Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,

Petitioners,

vs.

JESSE A. VAIL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

THOMAS R. MILLER
Miller, Tracy & Braun
Law Offices, P.C.
316 S. Charter
Monticello, IL 61856
(217) 762-9416
Counsel for Petitioners

MARC J. ANSEL
Erwin, Martinkus, Cole & Ansel, Ltd.
501 West University Avenue
Champaign, Il 61856
(217) 351-4040
Counsel for Respondent

PETITION FOR CERTIORARI FILED JULY 15, 1983.
CERTIORARI GRANTED OCTOBER 3, 1983.

JOINT APPENDIX

NO. 83-87

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,

PETITIONERS,

vs.

JESSE A. VAIL,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX TO APPENDIX

Pages

Chronological List of Relevant Orders and Other Proceedings 1

Proceedings in the United States District Court for the Central District of Illinois, Danville, Illinois

Complaint 6

Motion to Dismiss for Lack of Jurisdiction 23

Order 24

Answer 25

Findings of Fact, Conclusions of Law, Memorandum Opinion, and Final Order 31

Judgment 32

Notice of Appeal 34

Proceedings in the United States Court of Appeals For the Seventh Circuit, Chicago, Illinois

Opinion 36

Judgment 37

Proceedings in the United States Supreme Court

Order Allowing Certiorari 38

CHRONOLOGICAL LIST OF RELEVANT ORDERS AND OTHER PROCEEDINGS

Proceedings in the United States District Court for the Central District of Illinois, Danville, Illinois

Date	Proceedings
4/28/81	Complaint filed.
5/18/81	Motion to Dismiss for Lack of Jurisdiction by Defendants, Board of Education of Paris Union School District No. 95,Terrance C. Parks, Charles Fox and Bernie Rinehart, filed.
	Memorandum in Support of Motion to Dismiss by Defendants' attorney filed.
5/26/81	Plaintiff's Opposition to Motion to Dismiss for Lack of Jurisdiction filed.
6/5/81	Order entered denying Defendants' Motion to Dismiss. (BAKER,J.) Copy mailed to attorneys of record.
7/1/81	Motion to Dismiss Counts V & VIII of Plaintiff's Complaint or in the Alternative Answer to Counts I - VIII of Plaintiff's Complaint filed by Defendants.
	Affidavit of Terrance C. Parks In Support of Motion to Dismiss and Affidavit of Dr. James Cherry In Support of Motion to Dismiss filed.

Answer filed by Defendants.

7/8/81 Plaintiff's Opposition To Defendants' Second Motion to Dismiss filed.

7/31/81 Defendants' Motion to Dismiss denied. See written Order.
(BAKER,J.) mcb
Copy mailed to attorneys record.

10/14/81 Hearing on Status. App: For Plaintiff - Marc J. Ansel, For Defendants - S. Craig Smith. Status call held. Discovery completed. Cause allotted for pre-trial conference 12/2/81 at 9:00 a.m. (BAKER,J.)

11/30/81 Plaintiff's Pre-trial Memorandum filed.

12/2/81 Memorandum For Pre-trial Conference filed by Defendants.

12/4/81 Pretrial Minutes entered.
App: For Plaintiff - Marc J. Ansel; For Defendants - S. Craig Smith
This matter is set for bench trial 1/4/82 at 9:30 a.m. Estimated length of trial is 1-2 days. In the event trial is not concluded on 1/4/82 it is agreed by the parties that the matter will continue 1/8/82. (BAKER,J.)

Copy of pretrial minutes mailed to attorneys of record.

12/23/81 Plaintiff's Points & Authorities filed.

12/29/81 Defendants' Points & Authorities filed.

1/4/82 Cause called for bench trial. App: For Plaintiff - Marc Ansel, For Defendants - S. Craig Smith. On Plaintiff's Motion, the Defendant Parks is dismissed as to Count VIII as to rights claimed in Count VIII with prejudice. Oral motion by Plaintiff for leave to amend complaint to add as party defendant the individual members of the Board of Education of Paris Union School District No. 95, Motion denied. Opening statement by Mr. Ansel. Opening statement by Mr. Smith. Evidence presented for Plaintiff. Witnesses sworn and heard. Plaintiff rests 1:05 p.m. Evidence for Defendants. Witnesses sworn and heard. Defendants rest with exception of one deposition. Cause continued to 1/8/82 at 9:30 a.m. (BAKER,J.)

1/8/82 Bench Trial continued. Same appearances. Futher evidence presented by Defendants. Witnesses sworn and heard. Defendants rest. Rebuttal by Plaintiff. Witness sworn and heard. Proof closed. Argument for Plaintiff, argument for Defendants. Rebuttal for Plaintiff. Arguments heard, cause taken under advisement this date. (BAKER,J.)

1/13/82 Findings Of Fact, Conclusions of Law, Memo Opinion & Final Order entered. (BAKER,J.)
Copy mailed to attorneys of record.

Judgment On Decision by the Court entered.
Copy mailed to attorneys of
record.

J.S. #6 issued.

2/4/82 Notice Of Appeal filed by Defendants.

Supersedeas Bond on Appeal filed by Defendants.

Costs Bond On Appeal filed by Defendants. Sum of $250.00 received and deposited in registry fund.

Short Record mailed to U.S. Court of Appeals.

2/17/82 Record mailed to U.S. Court of Appeals.
Copy of docket sheets mailed to attorneys of record.

4/1/82 Hearing on Petition for Attorney's Fees. App: For Plaintiff - Marc Ansel, For Defendants - S. Craig Smith. Cause called for hearing on Plaintiff's application for attorney's fees, costs and expenses. Hearing held. Finding by the court that the sum of $5,355.00 is a reasonable attorneys' fees for the Plaintiff in connection with the handling of litigation. That the Plaintiff is also entitled to recover the sum of $375.00 in travel costs, $33.00 in photocopying and long distance phone calls and $419.35 for expenses. Additional judgment in favor of the Plaintiff and against the Defendant in the sum of $6,182.35. (BAKER,J.)

Judgment on Decision by the Court entered.
Copy mailed to attorneys of record.

4/12/82 Report of Proceedings filed by Court Reporter.

4/16/82 Supplemental Record mailed to U.S. Court of Appeals.

5/13/82 Report of Proceedings on Bench Trial filed by Court Reporter.

6/14/83 Certified copy of Order from U.S.Court of Appeals Affirming District Court's Opinion.

**PROCEEDINGS IN THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS,
DANVILLE, ILLINOIS**

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF ILLINOIS

DANVILLE, ILLINOIS

Case No. 81-2116

JESSE A. VAIL,

Plaintiff,

vs.

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX, and BERNIE RINEHART,

Defendants.

COMPLAINT

(Filed: April 28, 1981)

NOW COMES the Plaintiff, JESSE A. VAIL, by his attorneys, Zimmerly, Dodd, Ansel & Stout, P.C., and complains of Defendants BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95 ("Board"), TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART, as follows:

Jurisdiction and Venue

1. This is an action for declaratory, injunctive and other relief. Jurisdiction over Counts I,II and VII is conferred on this Court by 28 U.S.C. §1331, 1343, 2201 and 2202 by virtue of the fact that Plaintiff's cause of action arises under the Constitution and laws of the United States. Jurisdiction over Counts III through VI, and Count VIII is conferred by this Court's pendent jurisdiction as the claims arise out of the same operative facts as Counts I and II. The Plaintiff alleges that Defendants violated the Fourteenth Amendment of the Constitution of the United States, the Civil Rights Act, 42 U.S.C. §1983, Article I Section 2 of the Illinois Constitution of 1970, and Plaintiff's contract rights under Illinois law. The amount in controversy exceeds the sum of $10,000 exclusive of interest and costs.

The violation of Plaintiff's rights alleged herein was committed within the County of Edgar, State of Illinois.

Parties

3. Plaintiff, Jesse A. Vail, who is and was at all times relevant hereto a citizen of the United States of America and the State of Illinois, resides in the County of Edgar, State of Illinois. He is a qualified and duly certified physical education teacher. He has had over twenty years of teaching and coaching experience at the high school or college level. He was hired by the Board in 1980 as District Athletic Director, District Physical Education Coordinator and Head Football Coach with related teaching duties.

4. Defendant Board of Education of Paris Union School District No. 95 is organized and exists under the laws of the State of Illinois and operates, manages, controls and maintains the Paris Union School District No. 95.

5. Defendants Terrance C. Parks, Charles R. Fox and Bernie Rinehart, were and have been at all times mentioned herein duly elected and authorized members of the Board. Each resides in Edgar County and is sued in Counts VII and VIII individually on the causes of action alleged therein.

6. Relief is sought against each and all of the Defendants as well as its or their successors, employees and all persons acting in concert or cooperation with them or at their direction.

7. In taking the actions alleged herein, Defendants acted and are continuing to act under the cloak of their official offices and under the color of the laws, ordinances, regulations, customs and usages of the State of Illinois.

8. The claims of the Plaintiff are properly joined herein by virtue of Rule 20 of the Federal Rules of Civil Procedure in that the Plaintiff asserts rights jointly and severally or alternatively, Plaintiff's right to relief under each Count arises out of the same transactions and occurrences, and questions of law and fact common to all Defendants will arise in this action.

Facts Giving Rise To Plaintiff's Causes of Action

9. On June 15, 1980, Plaintiff was a resident of Joliet, Illinois, and had been employed for approximately ten years as Supervisor of Recreation and Physical Education for the Stateville Correctional Center in Joliet, Illinois, under the auspices of the Department of Corrections of the State of Illinois.

10. On or about June 15, 1980, two members of the Board visited with the Plaintiff at his residence in Joliet, Illinois, to discuss possible employment of the Plaintiff as District Athletic Director, District Physical Education Coordinator, and Head Football Coach by the School District.

11. During subsequent discussions between the Plaintiff and agents an offer for such position if his salary terms were met, and if he was guaranteed at least two years of employment and moving expenses incurred in relocating himself and his family from Joliet to Paris, Illinois.

12. Subsequently, the Board met and agreed to offer the Plaintiff employment for at least two years, with a moving allowance plus a regular salary.

13. The Board then authorized James H. Cherry, Superintendent of the School District, to extend the above terms of this offer to the Plaintiff.

14. The Superintendent thereafter did extend the above terms of this offer to the Plaintiff by telephone.

15. On hearing the terms of the offer, the Plaintiff did accept the offer.

16. In reliance on the above representations made by the Board, the Plaintiff did terminate his employment with the Department of Corrections of the State of Illinois in Joliet, and did relocate himself and his family to Paris, Illinois, assuming his duties in accordance with the terms of the verbal agreement beginning July 15, 1980.

17. After the acceptance referred to in paragraph 15 above, the Plaintiff was tendered a document with terms substantially in accordance with the terms of the oral agreement referred to above, except that the duration of employment was for eleven months from July 15, 1980, to June 15, 1981.

18. The Plaintiff signed this document only after receiving express verbal assurance that the Board would extend his employment for an additional year following June 15, 1981. A copy of this document is attached hereto as Exhibit "A".

19. On March 2, 1981, the Board met in an open and public session and voted three to two not to renew the Plaintiff's contract for the ensuing school year. Defendants Parks, Fox and Rinehart voted for the majority.

20. During that meeting, a member of the Board indicated in the presence of approximately 100 members of the public that the Plaintiff's termination was based on allegations that the Plaintiff shifted funds among accounts under his (Plaintiff's) authority.

21. Said statement clearly implied that said shifting of funds was unauthorized and improper.

22. On or about March 3, 1981, the President and the Secretary of the Board wrote to the Plaintiff informing him that the Board had decided not to re-employ the Plaintiff for the ensuing school term, and that his contract of employment would terminate effective June 15, 1981. A copy of this letter is attached hereto as Exhibit "B".

23. Plaintiff did not engage in any unauthorized or wrongful shifting of funds, and Plaintiff's termination was without cause.

24. At no time has the Plaintiff been afforded a hearing at which he could reply to any purported cause for his termination.

25. Plaintiff has a property interest in continued employment with the School District beyond June 15, 1981, in that his agreement with the Board provided for employment for a period of at least two years from July 15, 1980, and there are explicit understandings and customs that he would have continued employment unless there was cause for termination. The bases upon which this property interest exists include but are not limited to the following:

A. The offer extended to the Plaintiff by the Board of terms of employment including a duration of at least two years.

B. The representation and assurance of at least two years of employment extended by the Board immediately prior to the Plaintiff's signing of the document attached hereto as Exhibit "A".

26. The Plaintiff would not have quit his job with the Department of Corrections of the State of Illinois in Joliet, Illinois, and relocated himself and his family from Joliet to Paris, Illinois, if he were not promised at least two years employment by the Board.

Causes of Action

27. Paragraphs one through twenty-six are hereby incorporated herein and made a part of each Count that follows.

For Count I of his Complaint, the Plaintiff alleges against the Board as follows:

Count I

(Federal Constitutional Violation by the Board)

28. The actions of the Board, and each of them, violated the Fourteenth Amendment of the United States Constitution in that they have deprived Plaintiff of property without due process of law. More specifically, the decision to terminate Plaintiff's employment prior to the end of his two year term of employment:

A. Was arbitrary and capricious in that it was based on unlawful and irrelevant criteria and was made without cause;

B. Was made without affording Plaintiff notice and a hearing conducted in accordance with generally accepted principles of elemental fairness and due process.

WHEREFORE, the Plaintiff respectfully requests this Court to:

A. Enter a judgment declaring that the Board has violated the constitutional rights of the Plaintiff;

B. Permanently enjoin and restrain the Board, its members, agents, assistants, successors, employees, attorneys and all persons acting in concert or cooperation with the Board or at its direction from futher violating the rights, privileges and immunities guaranteed to the Plaintiff under the constitution of the United States;

C. Issue an order prohibiting the Board from terminating Plaintiff's employment without cause prior to July 15, 1982, or in the alternative, requiring the immediate reinstatement of the Plaintiff to his position with all the rights and privileges due Plaintiff in such position;

D. Grant compensatory damages to the Plaintiff in the sum of $100,000.00;

E. Grant punitive damages to the Plaintiff in the sum of $100,000.00;

F. Grant Plaintiff his costs of this action, including reasonable attorneys' fees as allowed by law; and

G. Grant such other relief as this Court may deem just and proper.

Count II

(Federal Constitutional Violation by the Board)

For Count II of his Complaint, Plaintiff alleges against the Board as follows:

29. The disclosure at the meeting of March 2, 1981, of the purported reasons for not extending the Plaintiff's employment after June 15, 1981, was stigmatizing and damged the Plaintiff's reputation.

30. The action of the Board in publicizing the purported reasons for not extending the Plaintiff's employment for a second year violated the Fourteenth Amendment of the United States Constitution in that by said action the Board has deprived the Plaintiff of liberty without due process of law. More specifically, the said publication was made without affording Plaintiff notice and a hearing and an opportunity to demonstrate that said allegations were false or to otherwise defend his reputation in this regard.

WHEREFORE, the Plaintiff respectfully requests this Court to:

A. Enter a judgment declaring that the Board has violated the constitutional rights of the Plaintiff;

B. Grant compensatory damages to the Plaintiff in the sum of $100,000.00;

C. Grant punitive damages to the Plaintiff in the sum of $100,000.00;

D. Grant Plaintiff his costs of this action, including reasonable attorneys' fees as allowed by law; and

E. Grant such other and further relief as this Court may deem just and proper.

Count III

(State Constitutional Violation by the Board)

For Count III of his Complaint, Plaintiff alleges against the Board as follows:

31. The actions of the Board in terminating the Plaintiff without cause prior to the end of his two year term of employment violated Article I Section 2 of the Illinois Constitution of 1970 in that said actions deprived Plaintiff of liberty and property without due process of law, all as is described above.

WHEREFORE, the Plaintiff respectfully requests this Court to:

A. Enter judgment declaring that the Board violated the State constitutional rights of the Plaintiff;

B. Permanently enjoin and restrain the Board, its members, agents, assistants, successors, employees, attorneys and all persons acting in concert or cooperation with the Board or at its direction from futher violating the rights, privileges and immunities guaranteed to the Plaintiff under the constitution of the State of Illinois;

C. Issue an order prohibiting the Board from terminating Plaintiff's employment without cause prior to July 15, 1982, or in the alternative, requiring the immediate reinstatement of the Plaintiff to his position with all the rights and privileges due Plaintiff in such position;

D. Grant compensatory damages to the Plaintiff in the sum of $100,000.00;

E. Grant punitive damages to the Plaintiff in the sum of $100,000.00;

F Grant Plaintiff his costs of this action, including reasonable attorneys' fees as allowed by law; and

G. Grant such other relief as this Court may deem just and proper.

Count IV

(State Constitutional Violation by the Board)

For Count IV of his Complaint, the Plaintiff alleges against the Board as follows:

32. The actions of the Board in publicizing the purported reasons for not extending the Plaintiff's employment for a second year without providing the Plaintiff with notice and a hearing violated Article I, Section 2 of the Illinois Constitution of 1970 in that they deprived Plaintiff of liberty and property without due process of law, all as is described above.

WHEREFORE, the Plaintiff respectfully requests this Court to:

A. Enter a judgment declaring that the Board has violated the State constitutional rights of the Plaintiff;

B. Grant compensatory damages to the Plaintiff in the sum of $100,000.00;

C. Grant punitive damages to the Plaintiff in the sum of $100,000.00;

D. Grant Plaintiff his costs of this action, including reasonable attorneys' fees as allowed by law; and

E. Grant such other and futher relief as this Court may deem just and proper.

Count V

(Cause of Action Against the Board for Fraud)

For Count V of his Complaint, Plaintiff alleges against the Board as follows:

33. The statements and representations of employment for at least two years, made to the Plaintiff at the time he accepted the terms of employment and repeated at the time of his signing of the writing attached hereto as Exhibit "A" were made in order to induce the Plaintiff to terminate his employment in Joliet and relocate himself and his family in Paris, Illinois.

34. Said statements and representations were made falsely and fraudulently and with the intention of deceiving the Plaintiff.

35. Relying on these representations and statements and believing them to be true, Plaintiff was thereby induced to and did terminate his employment in Joliet, Illinois, and relocated to Paris, Illinois, for the purpose of his assuming the responsibilities of the position offered to him by the Board.

36. Said representations were false and were known by the Board to be false.

37. The Board did not intend to guarantee the Plaintiff emplcyment for at least two years.

WHEREFORE, the Plaintiff respectfully requests this Court to:

A. Grant compensatory damages to the Plaintiff in the sum of $50,000.00;

B. Grant punitive damages to the Plaintiff in the sum of $100,000.00; and

C. Grant such other relief as this Court may deem just and proper.

Count VI

(Cause of Action Against the Board for Breach of Contract)

For Count VI of his Complaint, Plaintiff alleges against the Board as follows:

38. The actions of the Defendant Board constituted a Breach of Contract, allowing the Plaintiff damages as provided by law.

WHEREFORE, Plaintiff respectfully requests this Court to grant compensatory damages to the Plaintiff in the sum of $50,000.00, plus costs of this action.

Count VII

(Cause of Action Against Certain Board Members for Violation of Federal Constitutional Rights)

For Count VII of his Complaint, Plaintiff alleges against the Defendants, Parks, Fox and Rinehart as follows:

39. The Defendants, Parks, Fox and Rinehart knew or reasonably should have known that their vote not to extend the Plaintiff's contract for a second year as previously promised and agreed would violate the Plaintiff's constitutional rights.

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment against the individual Defendants Parks, Fox and Rinehart for compensatory damages in the amount of $100,000.00 and for punitive damages in the amount of $100,000.00, and for costs and reasonable attorneys' fees as provided by law, and for such other relief as this Court may deem just and proper.

Count VIII

(Cause of Action Against Certain Board Members for Fraud)

For Count VIII of his Complaint, the Plaintiff alleges against the Defendants Parks, Fox and Rinehart ("the individual Defendants") as follows:

40. Paragraphs 1 through 26 and 33 through 35 are hereby incorporated herein and made a part of this Count VIII.

41. Said representations were false and were known by the individual Defendants to be false at the time.

42. The individual Defendants did not intend to guarantee the Plaintiff employment for at least two years.

WHEREFORE, Plaintiff respectfully requests this Court to:

A. Grant compensatory damages to the Plaintiff from the individual Defendants in the sum of $50,000.00, and punitive damages in the sum of $100,000.00, and his costs of this action.

/s/ Jesse A. Vail
Plaintiff

/s/ Marc J. Ansel
One of His Attorneys

ZIMMERLY, DODD, ANSEL & STOUT, P.C.
201 American National Bank Bldg.
Post Office Box 3475
Champaign, IL 61820
(217) 356-6363

ATTORNEYS FOR PLAINTIFF

BOARD OF EDUCATION
OF PARIS UNION SCHOOL DISTRICT NO. 95
PARIS, ILLINOIS
ADMINISTRATIVE CONTRACT

IT IS HEREBY AGREED by and between the Board of Education of Paris Union School District No. 95, of the County of Edgar and State of Illinois, and Jesse A. Vail, a legally qualified administrator, that said administrator shall be employed in the position of District Athletic Director, District P.E. Coordinator and Head Football Coach, in the public schools of such district beginning July 15, 1980, and ending on June 15, 1981. (Eleven months)* Said administrator agrees to fulfill all his duties to the best of his ability in accordance with the provisions of the Illinois School Code; and to observe faithfully all the rules and regulations prescribed by the Board, the Superintendent of Schools, for the said school term. The compensation to be paid shall be the sum of $21,000 annually* payable twice a month.

Provided, that in case the said administrator shall be dismissed from said position by the said Board, or their successors in office, for any violation of any of the stipulations of this contract, in case his certificate should be revoked by the Regional Superintendent, or should he violate any of the provisions of the Illinois School Code, he shall not be entitled to compensation after such dismissal or revocation.

This contract is to be signed by the administrator and returned to the office of the Superintendent of District No. 95.

*Moving allowance in the sum of $1,200 in addition to salary.

Exhibit "A"

PARIS UNION SCHOOL DISTRICT NO. 95

/s/ James H. Cherry
Superintendent

/s/ Orville L. Williamson
President

/s/ Jesse A, Vail
Administrator

/s/ Terrance C. Parks
Secretary

(Letterhead omitted in printing)

March 3, 1981

Mr. Jesse Vail
409 West Madison Street
Paris, Illinois 61944

Dear Mr. Vail:

You are hereby notified that the Board of Education of Paris Union School District No. 95, Edgar County, Illinois, has decided it will not re-employ you as District Athletic Director, District Physical Education Coordinator, Head Football Coach, and related teaching duties in this school district for the ensuing school term, and your contract of employment will therefore terminate effective June 15, 1981.

Very Truly Yours,

BOARD OF EDUCATION OF PARIS UNION
SCHOOL DISTRICT NO. 95
EDGAR COUNTY, ILLINOIS

By /s/ Terrance C. Parks,
Sec. P.U.S.D. # 95
Secretary

By /s/ Orville L. Williamson
President

Exhibit "B"

(Title omitted in printing)

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF ILLINOIS

DANVILLE, ILLINOIS

MOTION TO DISMISS FOR LACK OF JURISDICTION

(Filed: May 18, 1981)

(See Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit--App. 53)

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF ILLINOIS

DANVILLE, ILLINOIS

Case No. 81-2116

JESSE A. VAIL,

Plaintiff,

vs.

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,

Defendants.

ORDER

(Filed: June 5, 1981)

(See Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit--App. 50)

(Title omitted in printing)

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF ILLINOIS

DANVILLE, ILLINOIS

ANSWER

(Filed: July 1, 1981)

Now comes the Defendants, BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART, by S. Craig Smith of Dillavou, Overaker, Asher and Smith, and answers Complaint filed by the Plaintiff, JESSE A. VAIL, as follows:

JURISDICTION AND VENUE

1. Defendants deny the Plaintiff has filed a Complaint which gives the United States District Court for the Central District of Illinois, jurisdiction and venue in this matter.

2. Defendants deny that Plaintiff's rights were violated.

3. Defendants admit allegations of Paragraph 3.

4. Defendants admit the allegation of Paragraph 4.

5. Defendants admit the allegations of Paragraph 5.

6. Defendants deny the allegations of Paragraph 6.

7. Defendants admit the allegations of Paragraph 7.

8. Defendants deny that Plaintiff has filed his action properly in the United States District Court for the Central District of Illinois, and denies the remaining allegations of Paragraph 8.

9. Defendants admit the allegations of Paragraph 9.

10. Defendants admit the allegations of Paragraph 10.

11. Defendants deny the allegations of Paragraph 11.

12. Defendants deny the allegations of Paragraph 12.

13. Defendants deny the allegations of Paragraph 13.

14. Defendants deny that the Superintendent extended to the Plaintiff employment for at least two years, but admit that the Plaintiff was extended employment for one year.

15. Defendants deny that the Plaintiff was extended an offer of two years employment, but admit that Plaintiff did accept one year's employment.

16. Defendants deny the Plaintiff was extended employment for a period of two years, but admit that the Plaintiff was extended a period of employment for one year, and admit that the Plaintiff did relocate himself and his family to Paris, Illinois, and began his duties on July 15, 1980. Defendants deny that the Plaintiff was offered any verbal agreement, but admit that the Plaintiff was offered a written contract which he executed.

17. Defendants deny that the terms of the written contract, were altered in any way, and that the Plaintiff was given a written contract in accordance with any terms given him orally.

18. Defendants deny the allegations of Paragraph 18.

19. Defendants admit the allegations of Paragraph 19.

20. Defendants deny the allegations of Paragraph 20.

21. Defendants deny the allegation of Paragraph 21.

22. Defendants admit the allegation of Paragraph 22.

23. Defendants state that the allegations contained in Paragraph 23 are not material to the issue presented by the Plaintiff, and affirmatively state that the Plaintiff, as a first-year probationary teacher, was not entitled to termination with cause; or in the alternative denies the allegations in Paragraph 23.

24. Defendants affirmatively state that the Plaintiff was a one year contract employee, and under the School Code of Illinois was not entitled to any hearing, termination with cause, or notice other than that given by the Board as alleged in Paragraph 22 of Complaint filed herein.

25. Defendants deny the allegations of Paragraph 25.

25A. Defendants deny the allegations of Paragraph 25A.

25B. Defendants deny the allegations of Paragraph 25B.

26. Defendants deny the allegations of Paragraph 26.

CAUSES OF ACTION

27. Defendants answers to Paragraph 1 through 26 are hereby incorporated herein and made a part of each answer to Counts that follow.

For answer to Count I of Plaintiff's Complaint, Defendants state as follows:

COUNT I

28. Defendants deny the allegations of Paragraph 28.

28A. Defendants deny the allegations of Paragraph 28A.

28B. Defendants deny the allegations of Paragraph 28B.

WHEREFORE, the Defendants respectfully request this Court to dismiss Count I of the Complaint filed herein and for their costs herein.

COUNT II

For answer to Count II of Plaintiff's Complaint, Defendants state as follows:

29. Defendants deny the allegations of Paragraph 29.

30. Defendants deny the allegations of Paragraph 30.

WHEREFORE, the Defendants respectfully request this Court to dismiss Count II of the Complaint filed herein and for their costs herein.

COUNT III

For answer to Count III of Plaintiff's Complaint, Defendants state as follows:

31. Denies the allegations of Paragraph 31.

WHEREFORE, the Defendants respectfully request this Court to dismiss Count III of the Complaint filed herein and for their costs herein.

COUNT VII

For answer to Count VII of Plaintiff's Complaint, Defendants state as follows:

39. Defendants deny the allegations of Paragraph 39.

WHEREFORE, the Defendants respectfully request this Court to dismiss Count VII of the Complaint filed herein and for their costs herein.

COUNT VIII

For answer to Count VIII of Plaintiff's Complaint, Defendants state as follows:

40. Defendants deny the allegations of Paragraph 40.

41. Defendants deny the allegations of Paragraph 41.

42. Defendants deny the allegations of Paragraph 42.

WHEREFORE, the Defendants respectfully request this Court to dismiss Count VIII of the Complaint filed herein and for their costs herein.

BOARD OF EDUCATION OF
PARIS UNION SCHOOL
DISTRICT NO. 95, TERRANCE C. PARKS,
CHARLES R. FOX and BERNIE RINEHART, Defendants,

By: /s/ Orville L. Williamson
President of School Board

By: /s/ Terrance C. Parks
Secretary of School Board

(Jurat and Proof of Service omitted in printing)

DILLAVOU, OVERAKER, ASHER & SMITH
Attorneys for Defendants
236 West Court Street
Paris, Illinois 61944
Telephone: (217) 465-6444

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF ILLINOIS

DANVILLE, ILLINOIS

Case No. 81-2116

JESSE A. VAIL,

Plaintiff,

vs.

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, MEMORANDUM OPINION, AND FINAL ORDER

(Filed: January 13, 1982)

(See Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit--App. 43)

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF ILLINOIS

DANVILLE, ILLINOIS

Case No. 81-2116

JESSE A. VAIL,

Plaintiff,

vs.

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,

Defendants

JUDGMENT

(Filed: January 13, 1982)

This action came on for trial before the Court, Honorable Harold A. Baker, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

It is Ordered and Adjudged that on Count I of the complaint the plaintiff, Jesse A. Vail, have and recover of the defendant, Board of Education of Paris Union School Dist.# 95, the sum of Nineteen thousand eight hundred fifty and 99/100 Dollars ($19,850.99) and costs of suit.

It is further ordered that on Count II judgment entered in favor of the defendant and against the plaintiff.

It is further ordered that Counts III, IV, V, and VI of the complaint are dismissed without prejudice.

It is further ordered that judgment is entered in favor of the defendants and against the plaintiff on Count VII.

It is further ordered that Count VIII is dismissed without prejudice.

Dated at Danville, Illinois this 13th day of January, 1982.

/s/ Robert J. Kauffman
Clerk of Court

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF ILLINOIS

DANVILLE, ILLINOIS

(Title omitted in printing)

NOTICE OF APPEAL

(Filed: February 4, 1982)

Notice is hereby given that BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, et.al., Defendants herein, appeals to the United States Court of Appeals for the Seventh Circuit from the final Judgment entered on this action on January 13, 1982..

The names of the parties to this Judgment and the names

and addresses of their respective attorneys are: BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX, and BERNIE RINEHART, Appellants herein, who are represented by S. CRAIG SMITH of Dillavou, Overbaker, Asher and Smith, 236 West Court Street, Paris, Illinois 61944, Telephone: (217) 465-6444; JESSE A. VAIL, who is represented by MARC J. ANSEL of Erwin, Martinkus and Cole, Lts., 501 West University Avenue, Champaign, Illinois 61820, Telephone: (217) 351-4040.

DATED: February 2, 1982.

BOARD OF EDUCATION
OF PARIS UNION
SCHOOL DISTRICT NO. 95, et al.,
Appellants

BY:/s/ S. Craig Smith
Attorney for Appellants

DILLAVOU, OVERAKER, ASHER & SMITH
236 West Court Street
Paris, Illinois 61944
Telephone: (217)465-6444

(Proof of Service omitted in printing)

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, CHICAGO, ILLINOIS

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS

Case No. 82-1202

JESSE A. VAIL,

Plaintiff-Appellee,

vs.

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95. TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,

Defendants-Appellants.

OPINION

(Filed: April 19, 1983)

(See Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit--App.1)

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS

Case No. 82-1202

JESSE A. VAIL,

Plaintiff-Appellee,

vs.

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95. TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,

Defendants-Appellants.

JUDGMENT

(Filed: April 19, 1983)

This cause was heard on the record from the United States District Court for the Central District of Illinois, Danville Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

PROCEEDINGS IN THE UNITED STATES SUPREME COURT

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS CHARLES R. FOX and BERNIE RINEHART,

Petitioners,

vs.

JESSE A. VAIL

Respondent.

ORDER

(Filed October 3, 1983)

ORDER ALLOWING CERTIORARI. FILED OCTOBER 3, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

Office-Supreme Court, U.S.
FILED
AUG 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-87

In The
Supreme Court of the United States
October Term, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX, AND BERNIE RINEHART,

Petitioners,

vs.

JESSE A. VAIL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MARC J. ANSEL, ESQ.
ERWIN, MARTINKUS, COLE & ANSEL, LTD.

Post Office Box 1676
501 West University Avenue
Champaign, Illinois 61820
(217) 351-4040

Counsel for Respondent

COCKLE PRINTING CO., 2111 Douglas St., Omaha 68102

TABLE OF CONTENTS

Subject Index

	Pages
Opinions Below	2
Statement of the Case	2
Reasons for Denying the Writ	4
Conclusion	11

TABLE OF AUTHORITIES

Cases

Board of Regents v. Roth, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) 4, 5

Hostrop v. Board of Junior College District No. 515, 471 F. 2d 488 (7th Cir., 1972) 9, 10

Perry v. Sindermann, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972) 4, 5, 6, 7, 8

Ryan v. Aurora City Board of Education, 540 F. 2d 222 (6th Cir., 1976) 7, 8, 9

Soni v. Board of Trustees of the University of Tennessee, 513 F. 2d 347 (6th Cir., 1975) 8, 9

Vail v. Board of Education of Paris Union School District No. 95, et al., 706 F. 2d 1435 (7th Cir., 1983) 4, 5, 6, 8, 10

Constitutional Provisions and Statutes

Illinois Revised Statutes, Chapter 122, Section 24-11 ..... 2, 8, 10

Illinois Revised Statutes, Chapter 122, Section 24-12 2

United States Code, Chapter 42, Section 1983 9

United States Constitution, Fourteenth Amendment 7

No. 83-87

In The
Supreme Court of the United States
October Term, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX, AND BERNIE RINEHART,

Petitioners,

vs.

JESSE A. VAIL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent, JESSE A. VAIL, respectfully prays that this Court deny the Petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on April 19, 1983.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit may be found at 706 F. 2d 1435 (7th Cir., 1983). It may also be found in Petitioners' Appendix at pages 1-42. The Opinion of the United States District Court for the Central District of Illinois, Danville Division, is included in Petitioners' Appendix as Exhibit "B" at pages 43-49.

———o———

RESPONDENT'S STATEMENT OF THE CASE

Respondent is dissatisfied with the Petitioners' Statement of the Case due to its inaccuracies, omissions, and particularly, its argumentative content. Respondent objects to the portion of the Petitioners' Statement (Petition, pp. 3-4) which argues and interprets the meaning of the Illinois School Code. The bald-faced conclusion that "a teacher without tenure is, in essence, an at-will employee of the School Board under Illinois law" (Petition, p. 3) is in direct contradiction to the findings and evidence presented below. In the interest of clarity and fairness, Respondent shall restate in simple form the facts material to the issues in the Petition.

Under Illinois' School Code, a public school teacher cannot acquire tenure until at least two (2) years of full-time, consecutive year-to-year employment. Ill. Rev. Stats. (1981), Chapter 122, Section 24-11. Once having acquired tenure, a teacher cannot be discharged except for cause upon specific charges and pursuant to certain procedures. *Id.*, Section 24-12.

According to the findings of fact in the case at bar, the Petitioner School Board offered the Respondent a two (2) year probationary term after Respondent, in preliminary discussions, expressed concern regarding the length of his proposed employment. The Board's specific assurance was that Respondent would sign a one (1) year written contract which would be renewed for an additional year. Respondent accepted this offer, left his residence in Joliet, Illinois, where he and his family had lived for thirteen (13) years, left a job he had held for ten (10) years, and took a salary cut to assume the position in Paris.

During Respondent's first year of employment, the Board met and voted not to renew his contract for the following year. No hearing or reasons for the non-renewal were given to Respondent.

The Respondent brought this action in Federal District Court, alleging that the decision to terminate him without stated cause or hearing during his two (2) year term of employment violated his Constitutional right to due process. The District Court found "that the Board made a commitment to the Plaintiff to extend his contract for a second year if he would accept the job in Paris" (Petitioner's Appendix [hereafter "Petition Apdx."] 46). It found that the Plaintiff had a two (2) year "contract" (Petition Apdx. 46) which constituted a "property interest" of which the Plaintiff was deprived by actions of the Board taken "under the color of state law" (Petition Apdx. 48). Stipulated damages were awarded.

On appeal, the Court of Appeals for the Seventh Circuit affirmed the District Court's decision, with one Judge

dissenting, finding that there was an implied two (2) year contract between the Respondent and the Board, enforceable under Illinois law. With respect to the necessity that such an enforceable contract exist, the majority of the Court of Appeals observed that this was not a prerequisite to establishment of a protected property interest under federal law.

REASONS FOR DENYING THE WRIT

I.

The Decision Of The Court Of Appeals For The Seventh Circuit Is Consistent With Prior Supreme Court Decisions.

Petitioners' contention that the Court of Appeals for the Seventh Circuit "misread" and chose "to ignore" (Petition, p. 6) applicable decisions of the Supreme Court does not survive analysis of the Supreme Court's decisions in *Board of Regents v. Roth*, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) and *Perry v. Sindermann*, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). Petitioners' contention stems from their admitted interpretation of *Roth* in its "broadest sense" (Petition, p. 6), and *Sindermann* in the narrowest possible sense.

Respondent rejects Petitioners' interpretation of these landmark cases in due process, but rather adopts the interpretation of these cases included in the Seventh Circuit's opinion in this case. *Vail v. Board of Education of Paris Union School District No. 95, et al.*, 706 F. 2d 1435 (7th

Cir., 1983) (also found in Petitioners' Appendix at pp. 1-42). As explained therein, *Roth* held that:

> ". . . a teacher terminated after one year had no property interest in his continued employment where his unilateral expectations had no basis in statute, contract, or mutually explicit understanding with the University. (citation to *Roth*, 408 U. S. at 578)". *Vail*, 706 F. 2d at 1437, Petition Apdx. 3.

Unlike *Roth*, a property interest was found in *Sindermann*, which held that a legitimate claim of continued employment:

> ". . . had been fostered by the rules and the policy of the University, despite the lack of tenure or a contractual provision. (Citation to *Sindermann*, 408 U. S. at 599-601)". *Id.*, Petition Apdx. 3-4.

These companion cases are analyzed and discussed in great detail by the Court of Appeals for the Seventh Circuit.

In applying the teachings of *Roth* and *Sindermann* to the case at bar, the Seventh Circuit noted that this case involves a *mutually explicit understanding* between the Respondent and the Petitioners (School Board) that he would be employed for the maximum probationary term of two (2) years. His expectation of continued employment for two (2) years was not merely subjective or unilateral. As in *Sindermann*, Respondent's claim of continued employment was fostered by actions of state officials. In fact, in the case at bar, these actions consisted of explicit promises from the highest governing authorities.

The gist of Petitioners' argument is that the *Sindermann* Court "attached special meaning to 'tenure'" (Petition, p. 6). They rely entirely on the footnote in *Sindermann* which states that "if (the respondent) has no con-

tractual or other claim to job tenure, the respondent's (due process) claim would be defeated". *Sindermann,* 408 U. S. at 602, n. 7. Conveniently interpreting this language in a vacuum, they imply that *Sindermann* limits school employees' federal property interests to claims of tenure, thereby excluding any other valid contractual or other rights of school employees from protection by due process. In other words, according to Petitioners, such school employees may be deprived of any right but tenure under color of law, no matter its character or value, and have no redress in federal court. As stated by Eschbach, J., concurring in *Vail,* such an interpretation "not only finds no support in the (*Sindermann*) opinion, but is plainly inconsistent with it". 706 F. 2d at 1444 (Petition Apdx. 17).

The *Sindermann* Court required legitimate claims to tenure before finding a "property" interest because tenure is what Sindermann claimed he had. As stated by Judge Eschbach: ". . . *Sindermann* indeed uses the term tenure—it would be awkward to use another word in discussing Sindermann's claim that he had tenure". *Id.* The *Sindermann* Court did not state or even imply that, in academic employment, claims of tenure are the only interests that could rise to the level of "property" interests under due process. Such a limitation finds no support in logic, or this Court's language. The *Sindermann* opinion made clear that such property interests "are not limited by a few rigid, technical forms". 408 U. S. at 601.

After interpreting *Sindermann* as holding that any claim of continued employment must be based on statutory tenure, Petitioners absurdly conclude that even a "contract right to continued employment can never rise to the

level of a property interest protected by the Fourteenth Amendment when viewed within the framework of a statutory tenure system". (Petition, p. 7) *Sindermann* did not even involve a formal statutory tenure scheme. See 408 U. S. at 600-602. Petitioners' argument on this point falls of its own weight.

II.

The Decision Of The Court Of Appeals For The Seventh Circuit Does Not Conflict With Any Decisions Of Other Federal Courts Of Appeal On The Same Matter.

Petitioners argue that the Opinion below is inconsistent with the Sixth Circuit's Opinion in *Ryan v. Aurora City Board of Education*, 540 F. 2d 222 (6th Cir., 1976), contending that *Ryan* is "virtually indistinguishable" from the instant case. Such is not the case. In the first place, *Ryan* is distinguishable on its facts. Secondly, the Sixth Circuit has ruled consistently on the very issue which Petitioners frame in the instant case.

Ryan is clearly and easily distinguishable from the case at bar. Unlike the case at bar, where the Respondent was terminated without stated cause or hearing *during* his term of employment, the Plaintiffs in *Ryan* were simply not rehired at the *conclusion* of their terms of employment. In addition, a contrary ruling in *Ryan* would have effectively overridden Ohio's statutory tenure system. For description see *Ryan*, 540 F. 2d at 224. In the case at bar, the Respondent did not claim that he had tenure at the end of a term of employment. He only claimed a property interest in completing the second year of his probationary employment as promised by the Pe-

titioners. Neither their promise nor his right to complete his limited term of employment would have infringed on the Illinois statutory tenure scheme, which grants tenure upon entering a third continuous year of employment. Ill. Rev. Stat. (1981) Chapter 122, Section 24-11.

As in their interpretation of *Sindermann*, Petitioners quote and rely on certain language in the *Ryan* opinion in a vacuum and entirely out of context (Petition, p. 8). Ryan, like Sindermann, and unlike Respondent, claimed that he had a right to indefinite continued employment, i. e., tenure. The *Ryan* language quoted by Petitioners that he (Ryan) could not have a legitimate claim to "continued employment" in the face of a statutory tenure system (540 F. 2d at 227) refers to a claim of *indefinite* continued employment (i. e., tenure), not a *limited* term of employment such as was claimed by Respondent herein.

Further indication that the Seventh Circuit's *Vail* decision does not conflict with opinions of the Sixth Circuit is the Sixth Circuit's holding in *Soni v. Board of Trustees of the University of Tennessee*, 513 F. 2d 347 (6th Cir., 1975). In *Soni*, the Sixth Circuit ruled on the very issue which Petitioners frame in the instant case: whether an academic employee can ever have a legitimate claim of continued employment on some basis other than an existing statutory tenure system. The facts in *Soni* showed that the parties had a "viable understanding" that the Plaintiff would have continued employment with the University despite state law and university regulations which prohibited an alien from obtaining statutory tenure. *Id.* at 351. In answering the question, the Sixth Circuit held that the "understanding" of the parties was sufficient to constitute a "property" right under due process, not-

withstanding the existence of a statutory tenure system. *Id.* at 350-1. *Soni* was distinguished in *Ryan* and relied on by the majority Opinion below (at 706 F. 2d at 1440; Petition Apdx. 9). *Soni* demonstrates conclusively that the positions of the Sixth and Seventh Circuits are not inconsistent on the issues resolved below.

III.

There Is A Federal Interest In This Case Under 42 U. S. C. Section 1983—The Existence Of A Remedy For Breach Of Contract Under State Law Does Not Preclude Existence Of A Property Right Under Federal Law.

The Petitioners argue (Petition, pp. 8-9) that an adequate remedy at law for a breach of contract in a state court somehow precludes existence of a federal interest under 42 U. S. C. Section 1983. Such is not the case, and no authorities are cited for this unfounded conclusion.

Instead of authority and argument, Petitioners raise the specter of this single case opening "the floodgates of a new wave of litigation under 42 U. S. C. Section 1983" (Petition, p. 9). This emotional appeal grossly overstates the significance of the decision below. Judge Eschbach, in his concurring opinion below, notes that this case is consistent with the 1972 decision of the Seventh Circuit in *Hostrop v. Board of Junior College District No. 515,* 471 F. 2d 488, and that there has been "no deluge of Section 1983 cases such as this since our decision in *Hostrop,* nor is that surprising" (706 F. 2d at 1449, Petition Apdx. 27). The reason why no such deluge has resulted from precedents such as *Hostrop, Soni* and the case at bar is obvious: "States have been on notice . . . that before dis-

charging a state employee in Vail's position, they must give the employee a meaningful opportunity to be heard." Eschbach, J., concurring opinion, *Vail*. Id. If, as Petitioners argue, the distinction between probationary and tenured employment status is "diluated" in this case, it is only because they, as governing state authorities, chose to bind themselves to the Respondent in a different manner than the usual year-to-year probationary employee, and after he relied on their promise, they chose to renege.

IV.

The Court Of Appeals' Interpretation Of The Illinois School Code Is Not Inconsistent With Any Controlling Decisions Of The Illinois Supreme Court.

The Illinois School Code does not specifically address the issue of school board authority to offer a two-year probationary term, such as was offered in this case. Further, Petitioners admit that the Illinois Supreme Court has never decided the issue (Petition, p. 10). The Seventh Circuit found in its Opinion that Section 24-11 of the Code contemplates just such a two-year probationary period as was promised to Respondent. It even suggested this interpretation of the Illinois School Code in the *Hostrop* case in 1972, and also suggested that the cause of action for violation of civil rights would exist even if Illinois law only permitted a one-year contract. (706 F. 2d at 1439; Petition Apdx. 8.)

Notwithstanding the Court of Appeals' ruling that the lack of an enforceable contract under state law would not preclude the establishment of a protected prop-

erty interest (706 F. 2d at 1440; Petition Apdx. 9), Petitioners choose to argue that any such two (2) year contract would be unenforceable under state law, based on Petitioners' interpretation of the Illinois School Code. The Petitioners' argument as to legislative intent, based on their interpretation of several different provisions of the School Code, was rejected by the Seventh Circuit. This argument, along with Respondent's argument, was thoroughly briefed and argued below. Suffice it to say that Respondent argued, and the Court of Appeals found (706 F. 2d at 1439; Petition Apdx. 6-7) that the Illinois School Code did *not* preclude the School Board from binding itself to a two-year contract with the Respondent.

In any event, the question of whether the Seventh Circuit properly interpreted the Illinois School Code in the absence of express applicable provisions or binding rulings of the Illinois Supreme Court is no basis for granting review on writ of certiorari.

CONCLUSION

Because there are no special or important reasons for reviewing this case, the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

MARC J. ANSEL, ESQ.
ERWIN, MARTINKUS, COLE & ANSEL, LTD.

Post Office Box 1676
501 West University Avenue
Champaign, Illinois 61820
(217) 351-4040

Counsel for Respondent

Dated: August 11, 1983.

Office - Supreme Court, U.S.
FILED
NOV 17 1983
ALEXANDER L. STEVAS,
CLERK

No. 83 - 87

In The

Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,

Petitioners,

vs.

JESSE A. VAIL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS

THOMAS R. MILLER
Miller, Tracy & Braun
Law Offices, P.C.
316 S. Charter
Monticello, IL 61856
(217) 762-9416
Counsel for Petitioners

KRAMER PRINTING COMPANY, Monticello, IL 61856

QUESTIONS PRESENTED

1. Whether the Illinois Tenure Statutes, Ill.Rev.Stat. 1981, ch. 122, par. 24-11, 24-12 permit multi-year contracts for probationary public school teachers.

2. Whether a probationary public school teacher may ever have a property interest in continued employment protected by the Fourteenth Amendment to the Constitution of the United States when there exists a state statutory system.

3. Whether the breach of a probationary public school teacher's employment contract is litigable in federal court under 42 U.S.C. §1983.

INDEX

Subject Index

Pages

Questions Presented i

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement 3

Summary of Argument 6

Argument 10

I. THE PROPER CONSTRUCTION OF THE ILLINOIS TENURE STATUTES WILL RESULT IN REVERSAL OF THE COURT OF APPEALS' DECISION WITHOUT REACHING ANY CONSTITUTIONAL ISSUE 15

II. A PROBATIONARY PUBLIC SCHOOL TEACHER HAS NO PROPERTY INTEREST IN CONTINUED EMPLOYMENT PROTECTED BY THE FOURTEENTH AMENDMENT WHEN THERE EXISTS A STATUTORY TENURE SYSTEM 21

INDEX -- Continued

III. THE BREACH OF A PROBATIONARY PUBLIC SCHOOL TEACHER'S EMPLOYMENT CONTRACT IS NOT LITIGABLE IN FEDERAL COURT UNDER 42 U.S.C. §1983 27

Conclusion 29

TABLE OF AUTHORITIES CITED

CASES CITED

Bessler v. Board of Education, 43 Ill.App.3d 322, 356 N.E.2d 1253 (3rd Dist., 1976), modified 69 Ill.2d 191, 370 N.E.2d 1050 (1976) . . . 8,10,20,27

Bio-Medical Laboratories, Inc. v. Trainor, 68 Ill.2d 540, 370 N.E.2d 223 (1977) 17

Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) 6,9,23,24,25,26

Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) 6,8,10,11,12 14,15,22,26

Board of Trustees v. Cook County College Teachers Union, Local 1600, 62 Ill.2d 470, 343 N.E.2d 473 (1976) 21

City of Chicago v. Fair Employment Practices Commission, 65 Ill.2d 108, 357 N.E.2d 1154 (1976) 18

Johnson v. Board of Education of Decatur School District No. 61, 85 Ill.2d 338, 423 N.E.2d 903 (1981) 8,18

CASES CITED -- Continued

Leis v. Flynt, 439 U.S. 438, 99 S.Ct. 698, 58 L.Ed.2d 717, rehearing denied 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979) *(per curiam)* 6,9,23,24,25,26

Miller v. School District No. 167, 354 F.Supp. 922, aff'd on other grounds, 495 F.2d 658 (7th Cir., 1974) 8,21

Northern Illinois Automobile Wreckers and Rebuilders Association v. Dixon, 75 Ill.2d 53, 387 N.E.2d 320 (1979), cert. den. 444 U.S. 844, 100 S.Ct. 87, 62 L.Ed.2d 57 (1979) 18

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) 6,10,27,28

Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) 6,7,8,9,10,13 14,15,22,23,25,26

Ryan v. Aurora City Board of Education, 540 F.2d 222 (1976) 8,9,22,23

Shirck v. Thomas, 486 F.2d 691 (7th Cir., 1973) . 21

Vail v. Board of Education of Paris Union School District No. 95, Terrance C. Parks, Charles R. Fox and Bernie Rinehart, 706 F.2d 1435 (7th Cir., 1983) 10,14,17, 22,27

CASES CITED -- Continued

Vance v. Board of Education, 2 Ill.App.3d 745, 277 N.E.2d 337 (1971) 8,21

Wesclin Education Association v. Board of Education of Wesclin Community Unit School District No. 3 of Clinton and St. Clair Counties, 30 Ill.App.3d 67, 331 N.E.2d 335 (5th Dist., 1975) 8,18,20,21

Zannis v. Lake Shore Radiologists, Ltd., 73 Ill.App.3d 901, 392 N.E.2d 126 (1979) 9,27

STATUTES AND CONSTITUTIONAL PROVISIONS

Illinois Revised Statutes 1981, ch. 122, par. 24-11 3,4,7,15,16,26

Illinois Revised Statutes 1981, ch. 122, par. 24-12 3,7,15,16

United States Code, ch. 42, Section 1983 . . 2,5,8,22

United States Constitution, Fourteenth Amendment, Section 1 2,11

No. 83 - 87

In The

Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,

Petitioners,

vs.

JESSE A. VAIL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1) is reported at 706 F.2d 1435 (1983). The opinion of the District Court (Pet. App. 43) is not reported.

JURISDICTION

The respondent brought his action for declaratory and injunctive relief and damages under the provisions of 42 U.S.C. §1983, claiming that the petitioners, acting under color of state law, terminated the respondent's contract of employment without cause, without notice and without hearing in violation of respondent's right to due process of law under the Fourteenth Amendment. (Pet. App. 43) The District Court found jurisdiction vested under the provisions of 28 U.S.C. §1343(3). (Pet. App. 43) Over petitioners' Motion to Dismiss for Lack of Jurisdiction, the District Court conducted a bench trial and entered its Findings of Fact, Conclusions of Law, Memorandum Opinion and Final Order on June 13, 1982. (Pet. App. 43-49)

Timely appeal was perfected to the United States Court of Appeals for the Seventh Circuit by the petitioners. (Pet. p. 2) On April 19, 1983, a split Court of Appeals affirmed the District Court by a two-to-one decision. (Pet. App. 1-42)

The Petition for a Writ of Certiorari was filed on July 15, 1983, and was granted on October 3, 1983. (J.A. p. 38) Jurisdiction of the United States Supreme Court to review the decision of the Court of Appeals by Petition for Writ of Certiorari is conferred by 28 U.S.C. §1254(1). (Pet. p. 2)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. §1983 and the Illinois School Code, Ill.Rev.Stat. 1981, ch. 122, par. 24-11 and 24-12, are set forth in the Petition

for Writ of Certiorari at App. 55-61.

STATEMENT

The petitioners are the Board of Education of Paris Union School District No. 95 (Board), Paris, Illinois, and three individual members thereof. (Pet. p. 2) The respondent (Vail) is a public school teacher certified under the laws of the State of Illinois; and at the time this action was commenced, he had over twenty years of teaching and coaching experience at the high school or college level. (Pet. App. 44)

Illinois has a statutory tenure system found in Sections 24-11 and 24-12 of the Illinois School Code, Ill.Rev.Stat. 1981, ch. 122. Under this statutory scheme, a public school teacher can acquire tenure only after two years of full-time, consecutive, year-to-year employment. Ill. Rev. Stat. 1981, ch. 122, par. 24-11. Having acquired tenure, a teacher is entitled to continued employment absent dismissal for cause.

Procedural protection afforded an Illinois public school teacher before he is discharged corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be discharged except for cause upon specific charges and pursuant to certain procedures. Ill. Rev. Stat. 1981, ch. 122, par. 24-12.

In contrast to the aforequoted protections afforded to the tenured teacher, the School Code provides relatively little protection for a nontenured teacher who simply is not reemployed for the next year. A nontenured teacher completing the first year of probationary service, only need be informed at least sixty days before the end of the school term of his nonretention, and a teacher completing the second year of probationary service is additionally entitled to know the reasons

for the nonrenewal. Ill. Rev. Stat. 1981, ch. 122, par. 24-11.

On June 15, 1980, a search committee, representatives of the Board, Board members Wallace and Davis, Superintendent Dr. James Cherry, and High School Principal Marchiando traveled to Joliet, Illinois, to interview the respondent for a job as athletic director, district physical education coordinator and football coach. (Pet. App. 44) Respondent was at that time employed as supervisor of recreation and physical education for the Stateville Correctional Center in Joliet. (Pet. App. 44)

In addition to talking about the nature of the duties Vail would be expected to perform, discussion between the search committee and Vail was also had concerning the length of the term of Vail's proposed contract. (Pet. App. 44) Vail expressed concern about the term of the proposed contract and commented that its length would be a factor in his deciding whether to accept the position if it was offered. (Pet. App. 44) The search committee told Vail that the length of the term of the contract would be a matter decided by the full Board and that the committee could make no commitment beyond the one-year statutory term of a first-year probationary teacher. (Pet. App. 44-45)

On June 24, 1980, the petitioner Board met in special session to consider hiring respondent. (Pet. App. 45) The Board unanimously agreed to offer Vail a contract of employment as athletic director and head football coach. (Pet. App. 45) After discussing the length of the term of the contract, it was the concensus of the Board that it would assure Vail that his one-year written contract would be renewed at the end of the first year. (Pet. App. 45) Superintendent Cherry was directed to make that kind of an offer to Vail, which he did by telephone that same evening. (Pet. App. 45)

Subsequently Vail traveled to Paris to execute the written contract, and in due course entered into the performance of his duties. (Pet. App. 45)

On March 2, 1981, during respondent's first year of employment, the Board met in public session; and pursuant to, and in full compliance with the statutory provisions outlined in Section 24-11 of the Illinois School Code, voted three to two not to renew respondent's contract for the following year. (Pet. App. 45) No hearing or reasons for the nonrenewal were given to respondent. (Pet. App. 45)

The respondent brought this action in Federal District Court, alleging, among other things, that the decision not to renew his contract without stated cause or hearing violated his Constitutional right to due process. (Pet. App. 45) The District Court found "... that the Board made a commitment to the plaintiff to extend his contract for a second year . . . " (Pet. App. 46) and that such commitment constituted a "property interest" of which Vail was deprived by the Board's failure to provide notice, reasons and a hearing in violation of 42 U.S.C. §1983. (Pet. App. 48) The District Court denied Vail reinstatement by concluding that he had "[A]n adequate remedy at law in money damages for the breach of contract and denial of property right that [was] worked upon him." (Pet. App. 49) Stipulated economic damages in the amount of $19,850.99 were awarded Vail. (Pet. App. 48)

On April 19, 1983, the Court of Appeals for the Seventh Circuit, with one Judge dissenting, affirmed the District Court's decision. (Pet. App. 1-42) The United States Supreme Court granted the Petition for Writ of Certiorari on October 3, 1983. (J.A. p. 38)

SUMMARY OF ARGUMENT

In 1972, this Court decided the companion cases of *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Since those decisions, the Court has considered other "property interest" questions, but has not decided any case specifically involving a probationary public school teacher's claim to Fourteenth Amendment property interest protection within the backdrop of a statutorily imposed job tenure system. See *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Jago v. Van Curen*, 454 U.S. 14, 18-19, 102 S.Ct. 31, 70, L.Ed.2d 13 (1981) *(per curiam)*; *Leis v. Flynt*, 439 U.S. 438, 442, 99 S.Ct. 698, 58 L.Ed.2d 717, reh. den. 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979) *(per curiam)*; and *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

In *Roth*, the Court held government benefits are "property" within the meaning of the Fourteenth Amendment, only when the recipient has a legitimate expectation, grounded in state law, to continue receiving such benefits. Because Professor Roth, a probationary employee under Wisconsin tenure statutes, could not point to any law or understanding that would support a "legitimate" expectation of a renewal of his one-year contract, the university's decision not to rehire him did not deprive him of a property interest sufficient to merit applying due process.

In *Sindermann*, the Court held a procedural due process right would exist if it could be shown that there existed a *de facto* tenure program fostered by the governmental employer. The Court remanded the case in order that Professor Sindermann be given the opportunity to prove there existed "mutually explicit under-

standings" between him and the university to support his *de facto* tenure claim. The Court, through Justice Stewart, commented upon the significance that a formal tenure system would have had on Sindermann's property interest claim if one had existed in Texas:

> If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job *tenure* the respondent's claim would be defeated. 408 U.S. at 602, n.7. (emphasis added).

The majority opinion of the Court of Appeals in the instant case relied primarily on its reading of *Sindermann*, while Judge Eschbach, in his concurring opinion, addressed the application of *Roth* at length. The Court of Appeals concluded that since respondent Vail had proven the existence of an implied contract right to a second year of probationary employment under Illinois contract law, he had established a protectible property interest under the Fourteenth Amendment of which he could not be deprived without due process in spite of the Illinois tenure scheme.

I. Illinois has a statutory tenure system found in Sections 24-11 and 24-12 of the Illinois School Code, Ill. Rev. Stat. 1981, ch. 122, par. 24-11 and 24-12. Under this system, new teachers are subject to a two-year probationary period consisting of two separate one-year contracts before they may attain tenure. A school district may choose not to rehire a first-year teacher merely by giving notice of nonrenewal within the statutory period. A second-year teacher must be given timely notice and the specific reasons for nonrenewal. On the other hand, a tenured teacher can be dismissed only for cause and after due process proceedings.

The result reached by the Court of Appeals rests soundly upon the conclusion that in Illinois, a probationary teacher may be hired to a multi-year contract. Had the Court of

Appeals concluded otherwise, the case could have been disposed of without reaching the Constitutional due process issue. The petitioners assert that the Court of Appeal's construction of the Illinois tenure statutes was erroneous based on state law precedent and rules of construction established by the Illinois Supreme Court. *Johnson v. Board of Education of Decatur School District No. 61*, 85 Ill.2d 338, 423 N.E.2d 903 (1981), *Wesclin Education Association v. Board of Education of Wesclin Community Unit School District No. 3 of Clinton and St. Clair Counties*, 30 Ill.App.3d 67, 331 N.E.2d 335 (5th Dist., 1975), and *Bessler v. Board of Education*, 43 Ill.App.3d 322, 356 N.E.2d 1253 (3rd Dist., 1976), modified 69 Ill.2d 191, 370 N.E.2d 1050 (1976).

If the Court were to agree that the Illinois School Code prohibits a two-year probationary contract, the Constitutional due process question would not be reached, for it is clear that the Illinois legislature has created a statutory scheme whereby a tenured employee has a property interest in continued employment, while a probationary teacher whose contract is not renewed does not. *Miller v. School District No. 167*, 354 F.Supp. 922 aff'd on other grounds, 495 F.2d 658 (7th Cir., 1974) and *Vance v. Board of Education*, 2 Ill.App.3d 745, 277 N.E.2d 337 (1971).

II. Even if the Court is convinced that the Court of Appeals' analysis of Illinois statutory law is correct and that a two-year probationary contract is permitted under Illinois law, there still is no federal interest in this case under 42 U.S.C. §1983.

Petitioners contend that *Roth* and *Sindermann* can be read for the proposition that under a state statutory tenure system a probationary employee can have no legitimate expectation of continued employment since the state has seen fit to restrict such a right to tenured employees. At least one Federal Circuit Court of Appeals has read *Sindermann* to say as much. *Ryan v. Aurora City Board of Educa-*

tion, 540 F.2d 222 (1976). The Ryan court held "that a non-tenured teacher has no 'expectancy' of continued employment, *whatever may be the policies* of the institution, where there exists a statutory tenure system", *Ryan* at 227, (emphasis added), and that "this conclusion is supported by the Supreme Court's decision in *Sindermann*". *Ryan* at 227. Such a reading is also plausible in light of the Court's subsequent decisions in *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) and *Leis v. Flynt*, 439 U.S. 438, 99 S.Ct. 698, 58 L.Ed.2d 717, reh. den. 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979) *(per curiam)*, which further delimited the boundaries of due process protections.

Although the facts in the case at bar differ from those of the other property interest cases decided by the Court because of the District Court's express finding that "... the plaintiff had a commitment for two years of employment by the defendant school board". (Pet. App. 48). The distinction is insignificant. It is insignificant because Illinois has a statutory tenure scheme which establishes and defines the parameters of respondent Vail's legitimate expectations of continued employment with the petitioner Board, much the same as Wisconsin's tenure provisions defined Professor Roth's employment expectations, the City of Marion's ordinance defined Policeman Bishop's employment expectations, and the Ohio Supreme Court's rules controlled *pro hac vice* representation by out-of-state attorneys. Patently, no board of education, no matter how unwittingly, has the authority or power to enlarge the limits of teacher tenure beyond statutory limits. Nor can this be accomplished by estoppel, 439 U.S. at 444, n.5., for to do so is to amend the Illinois tenure statutes by judicial decree.

Even in the absence of a property right protected by the Constitution, respondent Vail is not prevented from seeking redress in the Illinois courts for breach of his employment contract. *Zannis v. Lake Shore Radiologists, Ltd.*, 73

Ill.App.3d 901, 392 N.E.2d 126 (1979) and *Bessler v. Board of Education*, 43 Ill.App.3d 322, 356 N.E.2d 1253 (3rd Dist., 1976), modified 69 Ill.2d 191, 370 N.E.2d 1050 (1976). Appropriate damages would be awarded if respondent Vail were to prove, under state law, that he had an enforceable two-year employment contract which had been breached--a determination more appropriately left to the Illinois courts.

III. Assuming arguendo that respondent Vail's implied two-year probationary employment contract is a property interest under the Constitution, Vail suffered no deprivation of that interest given the availability of an adequate state common law remedy for breach of contract. *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Judge Posner, in his dissent, *Vail v. Board of Education of Paris Union School District No. 95, Terrance C. Parks, Charles R. Fox and Bernie Rinehart*, 706 F.2d 1435-1456 (7th Cir., 1983), gives exhaustive treatment to this issue; and to avoid repetition, the petitioners adopt his arguments and rationale in support of their reliance on *Parratt*.

ARGUMENT

Almost twelve years ago in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), this Court examined the right of nontenured teachers in public institutions to procedural due process prior to the nonrenewal of their contracts. Both cases were decided on the same day and both involved professors of political science at public institutions of higher learning whose one-year employment contracts had not been renewed. Each professor claimed that the institution's failure to provide a hearing violated due process rights afforded him by the Fourteenth Amendment and the Civil

Rights Act. This Court granted relief to Professor Sindermann, but not to Professor Roth.

In Roth, the Court held government benefits are "property" within the meaning of the Fourteenth Amendment, only when the recipient has a legitimate expectation, grounded in state law, to continue receiving such benefits. Justice Stewart, writing for the Court in *Roth*, recognized property interests protected by procedural due process "extend well beyond actual ownership of [material things.]" (408 U.S. at 571-72):

> It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. 408 U.S. at 577.

Justice Stewart delimited the parameters of the term:

> Certain attributes of "property" interests protected by procedural due process emerge from [prior] decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. 408 U.S. at 577.

That "legitimacy" must in turn be found in additional objective sources:

---

[1] United States Constitution, Fourteenth Amendment, Section 1 (Pet. App. 55); United States Code, Chapter 42, Section 1983 (Pet. App. 55 & 56)

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. 408 U.S. at 577.

The Court then focused on applying this definition to the nature of the interest asserted by Professor Roth. To establish a legitimate entitlement that would invoke the due process clause, Professor Roth first had to identify a property interest which would trigger due process protection. Because Professor Roth could not point to any law or understanding that would support a "legitimate" expectation of a renewal of his contract, the university's decision not to rehire him did not deprive him of a property interest sufficient to merit applying due process. 408 U.S. at 578. Of significance was that the State of Wisconsin had a statutory tenure system under which Professor Roth was a probationary employee.[2]

---

[2] Wis.Stat. §37.31(1) (1967), in force at the time, provided in pertinent part that

> All teachers in any state university shall initially be employed on probation. The employment shall be permanent during efficiency and good behavior after 4 years of continous service in the state university system as a teacher." *Roth* at 566, n.2.

Wis.Stat. §37.31(1) further provided that

> No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. Within 30 days of receiving the written charges, such teacher may appeal the discharge by a written notice to the president of the board of regents of state colleges. The board shall cause the charges to be investigated, hear the case and provide such teacher with a written statement as to their decision." *Roth* at 567, n.3.

In *Sindermann*, the Court held a procedural due process right would exist if it could be shown that there existed a *de facto* tenure program supported by" rules or mutually explicit understandings" fostered by the governmental employer. 408 U.S. at 601. Although primarily addressing the issue of *de facto* tenure, Justice Stewart, again writing for the Court, seized the opportunity to comment upon the significance that a formal tenure system would have had on Professor *Sindermann's* property interest claim if one had existed in Texas:

> A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service--and from other relevant facts--that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 579, 80 S.Ct. 1347, 1351, 4 L.Ed.2d 1409, so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no *explicit tenure system* even for senior members of its faculty, but that nonetheless may have created such a system in practice. See C. Byse & L. Joughin, Tenure in American Higher Education 17-28 (1959). 408 U.S.at 602. (emphasis added)

In footnote 7, Justice Stewart concludes:

> We do not now hold that the respondent has any such legitimate claim of entitlement to

> job tenure. For "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." Board of Regents v. Roth, *supra*, 408 U.S., at 577, 92 S.Ct. at 2709. *If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated.* 408 U.S. at 602. (emphasis added).

The majority opinion of the Court of Appeals in the case at bar appears to rely primarily on *Sindermann*, while Judge Eschbach, in his concurring opinion, addresses the application of *Roth* at length. Judge Eschbach opines that if a probationary school teacher can prove the existence of an implied contract right to continued employment under state law, he has satisfied the requirements of *Roth* to establish a protectible property interest under the Fourteenth Amendment. *Vail v. Board of Education of Paris Union School District No. 95, Terrance C. Parks, Charles R. Fox and Bernie Rinehart*, 706 F.2d 1435, 1443 (7th Cir., 1983) [3] Likewise, the majority opinion reasons that once the existence of an implied contract is established by a probationary teacher, a protectible property interest is created in spite of a statutory tenure scheme. *Vail* at 1438.

In addition to the issue of statutory construction advanced in Point I of this Brief, the other issues to be decided

[3] *Contra, Green v. Board of School Commissioners of the City of Indianapolis*, 716 F.2d 1191 (7th Cir., 1983), wherein the Court of Appeals for the Seventh Circuit, in a case decided less than four months after the Court's decision in *Vail*, suggested that the only property right a school bus driver has because of his one-year employment contract is the right to sue in state court for breach of contract.

are 1) whether a probationary public school teacher may ever have a property interest in continued employment protected by the Fourteenth Amendment when there exists a statutory tenure system; and 2) whether the breach of a probationary public school teacher's employment contract is litigable in federal court under 42 U.S.C. §1983. We shall show that under the authority of *Roth*, *Sindermann* and subsequent property interest cases decided by the Court, the answer to both of these questions is "no".

I. THE PROPER CONSTRUCTION OF THE ILLINOIS TENURE STATUTES WILL RESULT IN REVERSAL OF THE COURT OF APPEALS' DECISION WITHOUT REACHING ANY CONSTITUTIONAL ISSUE.

Unlike *Sindermann*, the instant case presents a claim by a public educational employee that flies in the face of an established state tenure system. Illinois' statutory tenure system is found in Sections 24-11 and 24-12 of the Illinois School Code, Ill.Rev.Stat. 1981, ch. 122, par. 24-11, 24-12. The Illinois legislative plan as to tenure and public school teachers is plain. New teachers in a school district are subject to a two-year probationary period consisting of two separate one-year contracts before they attain tenure.

Section 24-11 of the Illinois School Code provides, *inter alia*:

> Any teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason therefor, by registered mail by the employing board at least 60 days before the end of such period. For the purpose of determining contractual continued service, the first probationary year shall be any full time employment from a date

> before November 1 through the end of the school year. . . .
>
> Any full-time teacher who is completing the first year of the probationary period described in the preceding paragraph, or any teacher employed on a full-time basis not later than January 1 of the school term, shall receive written notice from the employing board at least 60 days before the end of any school term whether or not he will be reemployed for the following school term. *If the board fails to give such notice, the employee shall be deemed reemployed, and not later than the close of the then current school term the board shall issue a regular contract to the employee as though the board had reemployed him in the usual manner.* Ill.Rev.Stat. 1981, ch. 122, par. 24-11. (emphasis added).

As can be seen above, a school district may choose not to rehire a first-year teacher merely by giving notice of nonrenewal within the statutory period. If such notice is not given, the school district is then obligated to issue to the teacher a regular contract for the second probationary year. A second-year teacher must be given timely notice of nonrenewal and a list of the reasons therefor; otherwise the teacher automatically advances to tenure. Ill.Rev.Stat. 1981, ch. 122, par. 24-11. Once tenure attaches, the teacher cannot be discharged, except for cause upon specific charges, pursuant to certain due process procedures; and if the cause is remediable, the teacher must be given a reasonable opportunity to correct the deficiency prior to discharge. (See Ill. Rev. Stat. 1981, ch. 122, par. 24-11 and 24-12; Petition for Writ of Certiorari, App. 56).

The result reached by the Court of Appeals below rests soundly upon the conclusion that in the State of Illinois, a

probationary teacher may be hired to a multi-year contract. *Vail* at 1439. The Court of Appeals was unable to point to any statutory provision empowering Illinois school boards to hire probationary teachers to multi-year contracts, but reasoned that because the provisions which empower boards to hire teachers do not limit the length of teacher contracts, multi-year contracts are sanctioned by state law. *Vail* at 1439. This premise is a clear misreading of the plain language of the state statutes and ignores the firmly established principle of Illinois law that a school board has only those powers expressly authorized by the state legislature through statute.[4] *Bio-Medical Laboratories, Inc. v. Trainor,*

---

[4] Had the legislature meant boards to have the power to offer teachers multi-year contracts, it would have specifically so provided as it did in Sections 10-23.8 and 10-23.8a of the Illinois School Code. Section 10-23.8 states, *inter alia*:

> *§10-23.8 Superintendent under multi-year contract. To employ a superintendent under a multi-year contract. No such contract can be offered or accepted for less than or more than three years, except for a person serving as superintendent for the first time in Illinois. In such case, the initial contract shall be for a two year period. Such contract may be discontinued at any time by mutual agreement of the contracting parties, or may be extended for an additional 3 years at the end of any year.*

Section 10-23.8a states, inter alia:

> §10-23.8a Principal under multi-year contract. To employ a principal under a multi-year contract. No such contract can be offered or accepted for less than or more than 3 years, except for a person serving as principal for the first time in Illinois. In such case, the initial contract shall be for a 2 year period. Such contract may be discontinued at any time by mutual agreement of the contracting parties, or may be extended for an additional 3 years at the end of any year.

68 Ill.2d 540, 551, 370 N.E.2d 223 (1977); *Northern Illinois Automobile Wreckers and Rebuilders Association v. Dixon*, 75 Ill.2d 53, 60, 387 N.E.2d 320 (1979), cert. den. 444 U.S. 844, 100 S.Ct. 87, 62 L.Ed.2d 57 (1979); *City of Chicago v. Fair Employment Practices Commission*, 65 Ill.2d 108, 112-113, 357 N.E.2d 1154 (1976). It also flies in the face of the stated purpose of the Illinois tenure provisions and rules of construction to be placed on those provisions by Illinois courts:

> The tenure system is, we believe, intended to provide continuity and stability for students; provide some degree of job security, thus affording teachers the ability to pursue a career free from arbitrary hiring and firing; attract teachers of high quality; and retain experienced teachers. *Since, however, the statutes create liabilities where none would otherwise exist, they must be strictly construed in order not to unduly interfere with the responsibility of local boards to efficiently operate the educational systems.* *Johnson v. Board of Education of Decatur School District No. 61*, 85 Ill.2d 338, 423 N.E.2d 903 (1981). (emphasis added)

Though the Illinois Supreme Court has yet to rule on the legality of a two-year probationary contract within the framework of the Illinois statutory tenure scheme, petitioners submit that were the Court given the opportunity, it would adopt the reasoning of the Illinois Appellate Court as expressed in *Wesclin Education Association v. Board of Education of Wesclin Community Unit School District No. 3 of Clinton and St. Clair Counties*, 30 Ill.App.3d 67, 331 N.E.2d 335 (5th Dist., 1975). *Wesclin* dealt with the issue of whether an Illinois "school board can impose upon itself conditions precedent to the dismissal of a nontenured teacher, which are in excess of the conditions imposed by the School Code". *Wesclin* at 75. In *Wesclin*, the Court

stated:

> In order to analyze this issue we must examine the nature and origin of a school board's power. A school board is the creation of the General Assembly. (Ill. Rev. Stat. 1971, ch. 122, par. 10--1 *et seq.*) It is a body politic and corporate created to perform governmental functions in connection with the education of children in its respective school district and it has such powers as are expressly conferred or such as may be necessary to carry into effect those granted by the General Assembly. *(Board of Education v. Chicago Teachers Union*, 26 Ill.App.3d 806, 326 N.E.2d 158; *Rosenheim v. City of Chicago*, 12 Ill.App.2d 382, 139 N.E.2d 856.) Statutes conferring powers on a school board must be strictly construed and should be construed not only as a grant of power but also as a limitation thereof. *Bohn v. Stubblefield*, 238 Ill.App. 453.
>
> Section 10--22.4 of the School Code vests a board of education with the authority to dismiss teachers. Such authority is limited only by sections 24--11 to 24--15, inclusive. Under section 24--11 of the School Code, a "probationary" (nontenured) teacher is only entitled to receive "written notice from the employing board at least 60 days before the end of any school term whether or not he will be re-employed for the following school term" (Ill. Rev. Stat. 1971, ch. 122, par. 24--11); whereas under section 24--12, a teacher in continued contractual service status is entitled to procedural protection such as a hearing, specific charges and proper cause.

warnings in remedial cases and preference in rehiring where dismissal is due to the decrease in the number of teachers. As stated by the court in *Rockford Education Association v. Board of Education*, 11 Ill.App.3d 78, 80, 296 N.E.2d 100, 102:

> "The Teacher Tenure Law appears to be designed primarily for the protection of tenured teachers, evidencing an intent to give first year probationary teachers the least amount of protection and the board the maximum amount of flexibility in dealing with such teachers so long as the notice requirement is fulfilled. *People ex rel. Ruff v. School Directors* (1948), 335 Ill.App. 445, 448, 82. See also *Hankenson v. Board of Education* (1957), 10 Ill.2d 560, 563."

We believe that just as a school board cannot abrogate the procedural safeguards accorded tenured teachers, neither can it, by means of a collective bargaining agreement, destroy the flexibility accorded it with respect to the dismissal of nontenured teachers. See *Board of Education v. Rockford Education Association*, 3 Ill.App.3d 1090, 280 N.E.2d 286; *Elder v. Board of Education of School District No. 127½*, 60 Ill.App.2d 56, 208 N.E.2d 423; *Stroh v. Casner*, 201 Ill.App. 281. *Wesclin* at 75 and 76.

In accord with *Wesclin* is *Bessler v. Board of Education*, 43 Ill.App.3d 322, 370, 356 N.E.2d 1253 (3rd Dist., 1976), modified 69 Ill.2d 191, 370 N.E.2d 1050 (1977), in which the Third District Illinois Appellate Court held that the

probationary period under Illinois law is a mandatory term prescribed by statute, which cannot be altered by a board of education.

Applying the rationale of *Wesclin*, along with the Illinois Supreme Court's rules of statutory construction, petitioners contend that the Illinois Supreme Court would conclude that Section 24-11 of the Illinois School Code prohibits a two-year probationary contract and that, consequently, respondent Vail had nothing more than what the statute provides--a one-year contract which was not renewed by the petitioner Board. Under such a ruling, the Constitutional due process question would not be reached for it is clear that the Illinois legislature has created a statutory scheme for its public school teachers whereby a tenured employee has a property interest in continued employment, while a probationary teacher whose contract is not renewed does not. *Miller v. School District No. 167*, 354 F.Supp. 922, aff'd on other grounds, 495 F.2d 658 (7th Cir., 1974), petition for rehearing denied, 500 F.2d 711 (7th Cir., 1974); see also *Vance v. Board of Education*, 2 Ill.App.3d 745, 277 N.E.2d 337 (1971). *Shirck v. Thomas*, 486 F.2d 691 (7th Cir., 1973). (statutory requirement that a final-year probationary teacher be given reasons for dismissal does not create a "property interest"); *Board of Trustees v. Cook County College Teachers Union, Local 1600*, 62 Ill.2d 470, 343 N.E.2d 473 (1976). (an evaluation clause in a collective bargaining agreement does not create a "property interest" in a nontenured teacher sufficient to require a due process hearing).

II. A PROBATIONARY PUBLIC SCHOOL TEACHER HAS NO PROPERTY INTEREST IN CONTINUED EMPLOYMENT PROTECTED BY THE FOURTEENTH AMENDMENT WHEN THERE EXISTS A STATUTORY TENURE SYSTEM.

---

[5]There is no contention that the Board failed to act in compliance with the nonrenewal procedures of Section 24-11.

If the Court is convinced that the Court of Appeals' analysis of Illinois statutory law is correct and that a two-year probationary contract is not prohibited under Illinois law, there still is no federal interest in this case under 42 U.S.C. §1983.

This Court has yet to equate a probationary employee's contract right to employment with a property right secured by the Constitution. While petitioners endorse Judge Posner's dissenting argument on the property interest question, *Vail* at 1449-1452, they advance yet another rationale for the proposition that a probationary teacher's implied contract right to continued employment can never rise to the level of a property interest protected by the Fourteenth Amendment when viewed within the framework of a statutory tenure system. That rationale stems from the reasoning expressed by the Court in *Roth* and *Sindermann*.

Roth and *Sindermann* can be read for the proposition that under a statutory tenure system a probationary employee, or otherwise nontenured teacher, can have no legitimate expectation of continued employment since the state has seen fit to restrict such a right to tenured employees. At least one Federal Circuit Court of Appeals has read *Sindermann* to say as much. In *Ryan v. Aurora City Board of Education*, 540 F.2d 222 (1976), the plaintiffs, like respondent Vail, were nontenured teachers under a statutory tenure system, which conferred tenure rights upon such teachers only after a period of probationary employment. The plaintiff in *Ryan* argued that certain regulations adopted by the board of education contained a clearly "implied promise" under *Roth* to continued employment, thereby creating a property interest protectible by the Constitution. Like the plaintiffs in *Ryan*, respondent Vail bases his entitlement to Fourteenth Amendment protection on an implied agreement with the defendant board of education. The basis of the "implied promise" in *Ryan* is the only distinguishing fact

from the case at hand. This distinction is hollow in light of the fact that both "implied promises" were the creation of the employing boards of education. In other words, the implied promise occasioned by a concensus opinion of the board in *Vail* is no different than the implied promise created by rule or regulation in *Ryan*.

The *Ryan* court concluded "[t]hat a non-tenured teacher has no 'expectancy' of continued employment, *whatever may be the policies* of the institution, where there exists a statutory tenure system", *Ryan* at 227, (emphasis added), and that "[t]his conclusion is supported by the Supreme Court's decision in *Sindermann*". *Ryan* at 227. Such a reading is also plausible in light of the Court's subsequent decisions in *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) and *Leis v. Flynt*, 439 U.S. 438, 99 S.Ct. 698, 58 L.Ed.2d 717, reh. den. 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979) *(per curiam)*, which further delimited the boundaries of due process protections.

In *Bishop v. Wood*, the City of Marion, North Carolina, discharged a city police officer without a hearing, despite his classification as a permanent employee. 426 U.S. at 343. The city, however, did comply with the minimal procedures prescribed by ordinance. 426 U.S. at 347. Bishop argued that his classification as a permanent employee under the ordinance created a protected property interest in his job. 426 U.S. at 344. Justice Stevens, expressing the view of five members of the Court, stated the issue squarely as "[w]hether petitioner's employment status was a property interest protected by the Due Process Clause of the Fourteenth Amendment, . . . " (footnote omitted) 426 U.S. at 343. The Court, through Justice Stevens, concluded it was not. Relying on a federal district court's interpretation of the city ordinance, Justice Stevens construed the ordinance "as granting no right to continued employment but merely conditioning an employee's removal on compliance with certain specified procedures." (footnote omitted) 426 U.S. at 345. The Court justified its deference to state law

in determining when employment constituted "property" by noting that "[t]he federal court is not the appropriate forum in which to review a multitude of personnel decisions that are made daily by public agencies." (footnote omitted) 426 U.S. at 349. Thus, because the city, as a matter of law, could discharge Bishop at will as long as it followed certain minimal procedures, his status failed to generate the legitimate expectation that would support a property interest when that expectation was founded upon a mistaken understanding of state law, regardless of how reasonable that understanding was.[6]

Leis v. Flynt involved the summary denial of permission by Ohio courts for two out-of-state attorneys to appear *pro hac vice* on their clients' behalf. The attorneys claimed that the denial deprived them without due process of their property interests in the ability to practice law. 439 U.S. at 438. Adopting the reasoning expressed in *Bishop*, the Court stated that it need not address the due process question until the property interest question was answered. 439 U.S. at 441. In order for the attorneys to establish a property interest, they had to do so by means of some objective legal source. 439 U.S. at 441.

---

[6] A number of federal circuit courts have held that an employee does not have a right or property in his job when his expectation of continued employment is at odds with federal or state law or with published tenure rules. *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093 (9th Cir. 1981); *Quinn v. Syracuse Model Neighborhood Corporation*, 613 F.2d 438 (2d Cir. 1980); *Eichman v. Indiana State University Board of Trustees*, 597 F.2d 1104 (7th Cir. 1979); *Davis v. Oregon State University*, 591 F.2d 493 (9th Cir. 1978); *Mack v. Cape Elizabeth School Board*, 553 F.2d 720 (1st Cir. 1977); *Ryan v. Aurora City Board of Education*, 540 F.2d 222 (6th Cir. 1976); *Lukac v. Acocks*, 466 F.2d 577 (6th Cir. 1972). Accord *Penman v. Board of Trustees*, 94 Ill.App.3d 139, 145-146 (5th Dist. 1981) (Pet.App. 8, n.5).

In concluding that the interest alleged in *Flynt* was not a legitimate property interest, the Court rejected the notion that there should be an examination of the factual possibility that an understanding sufficient to create a legitimate expectation may have developed from the Ohio courts' practice of permitting *pro hac vice* representation. 439 U.S. at 442-43. The Court found it unnecessary to reach this factual question because "the rules of the Ohio Supreme Court expressly consign the authority to approve a *pro hac vice* appearance to the discretion of the trial court." 439 U.S. at 443. In replying to Justice Stevens' dissenting suggestion that a *de facto* change in the stated rules may have occurred based on practices of Ohio trial courts, 439 U.S. at 453-56, the Court stated:

> The second ground for due process protection identified in the dissenting opinion is the "implicit promise" inherent in Ohio's past practice in "assur[ing] out-of-state practitioners that they are welcome in Ohio's courts. . . . " Post, at 456, 453, 58 L.Ed.2d, at 730, 728. We recall no other claim that a constitutional right can be created--as if by estoppel--merely because a wholly and *expressly* discretionary state privilege has been granted generously in the past. 439 U.S. at 444, n.5. (emphasis in original).

Thus, the Court deferred, as it similiarly had done in *Bishop*, to rules which had been promulgated by the regulating authority, to-wit, the Ohio Supreme Court, in determining whether an interest is property within the meaning of the Constitution. The Court's reliance in *Flynt* on the role of the Ohio Supreme Court rules in assessing the property interest issue seems consistent with Justice Stewart's statement in *Sindermann* that "[i]f it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job *tenure* the respondent's claim would be defeated". 408 U.S. at 602, n.7. (emphasis added).

Admittedly, the facts in the case at bar differ from those of the other property interest cases discussed above because of the District Court's express finding that "... the plaintiff had a commitment for two years of employment by the defendant school board". (Pet. App. 48) This distinction, however, is insignificant in light of the fact that Illinois has a statutory tenure scheme which establishes and defines the parameters of respondent Vail's legitimate expectations of continued employment with the petitioner Board, much the same as Wisconsin's tenure provisions defined Professor Roth's employment expectations, the City of Marion's ordinance defined Policeman Bishop's employment expectations, and the Ohio Supreme Court's rules controlled *pro hac vice* representation by out-of-state attorneys.

As earlier explicated, Section 24-11 of the Illinois School Code fixes the tenure expectations for teachers in Illinois' public schools. Only those teachers who have tenure are entitled to an expectancy of employment terminable only for cause. Patently, no board of education, no matter how unwittingly, has the authority or power to enlarge the limits of teacher tenure beyond statutory limits. Neither can this be accomplished by estoppel. 439 U.S. at 444, n.5. To render a decision, as both the District Court and Court of Appeals have done, which confers certain tenure privileges upon nontenured teachers is, in effect, to amend the Illinois tenure statute by judicial decree. Such a decision also ignores the teachings of *Roth, Sindermann, Bishop* and *Flynt*.

All of this is not to say that the respondent is barred from seeking redress for breach of his employment contract. As

---

[7] There is no dispute that Respondent Vail knew the statutory scheme under which he was employed. Not only was he told on several occasions that he would be offered only a one-year written contract, he had also had some 20 years of experience in the public schools. (Pet. App. 44)

Judge Posner points out in his dissent: "An employee complaining of a breach of an employment contract under Illinois law has a right to damages for the breach, but not a right to specific performance of the contract, *Zannis v. Lakeshore Radiologists, Ltd.*, 73 Ill.App.3d 901, 392 N.E.2d 126 (1979), to reinstatement in other words . . . " *Vail* at 1452. This principle was applied to nontenured teachers in *Bessler v. Board of Education*, 69 Ill.2d 191, 370 N.E.2d 1050 (1977). Undoubtedly, the respondent would be awarded appropriate damages if he were to prevail in state court, assuming that his two-year commitment was legal under Illinois law--a determination more appropriately left to the Illinois courts.

III. THE BREACH OF A PROBATIONARY PUBLIC SCHOOL TEACHER'S EMPLOYMENT CONTRACT IS NOT LITIGABLE IN FEDERAL COURT UNDER 42 U.S.C. §1983.

Assuming arguendo that an implied two-year probationary employment contract is a property interest recognized by the Constitution, the remaining issue in this case is whether respondent Vail suffered a deprivation of that interest given the availability of an adequate state common law remedy for breach of contract. On the strength of *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), we feel that Vail did not.

While incarcerated in a Nebraska penitentiary, Bert Taylor, Jr., ordered hobby materials valued at $23.50. 451 U.S. at 529. Even though Taylor paid for the materials, he never received them because two employees of the prison failed to follow established state procedures designed to ensure delivery. 451 U.S. at 530. Taylor sued under Section 1983 claiming a loss of property without due process of law. 451 U.S. at 529. A Federal District Court granted him summary judgment, the Court of Appeals for the Eighth Circuit affirmed. 620 F.2d 307 (8th Cir., 1980) *(per curiam)*. This Court reversed the Court of Appeals by holding that the

respondent had not established that the admitted deprivation of property occurred without due process of law, noting that due process did not always require a predeprivation hearing. 451 U.S. at 537. The Court found that the availability of a Nebraska law remedy provided Taylor with a "meaningful opportunity" to test the propriety of the state's action sufficient to satisfy Constitutional demands of due process. According to the Court, "Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under §1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process." 451 U.S. at 544. Thus, the Court found that Taylor was not deprived of a Constitutional right without due process of law, and thus stated no claim under §1983. 451 U.S. at 544.

Again, the petitioners adopt the arguments advanced by Judge Posner in his dissent.[8] Applying *Parratt* to the facts at hand leads to the conclusion that respondent Vail has an adequate remedy under Illinois law sufficient to compensate him "for the property loss he suffered", 451 U.S. at 544, and, thus to satisfy Constitutional demands. Consequently, respondent Vail has no claim under Section 1983.

---

[8]Since Judge Posner has given exhaustive treatment to this issue, petitioners see no need to be repitious, but rather direct the Court's attention to that part of the dissent found in *Vail* at 1453-1456.

CONCLUSION

The judgment of the Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

THOMAS R. MILLER
MILLER, TRACY & BRAUN
LAW OFFICES, P.C.
316 South Charter
Monticello, Illinois

Counsel for Appellant

Office-Supreme Court, U.S.
FILED
DEC 17 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-87

In The

Supreme Court of the United States

October Term, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,

Petitioners,

vs.

JESSE A. VAIL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

MARC J. ANSEL, ESQ.
ERWIN, MARTINKUS, COLE & ANSEL, LTD.
Post Office Box 1676
501 West University Avenue
Champaign, Illinois 61820
(217) 351-4040

Counsel for Respondent

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Illinois School Code, *Ill. Rev. Stats.* (1981) Chapter 122, Section 1-1 et. seq., prohibits a two (2) year term of probationary employment.

2. Whether Respondent had a legitimate claim of entitlement to continued employment for one (1) more year based on his mutually explicit understanding with the School Board (Petitioners).

3. Whether a statutory tenure scheme precludes any other type of "property" interest in an academic setting.

4. Whether Respondent was entitled to a predeprivation hearing when terminated during his term of employment by a deliberate, considered decision of the School Board (Petitioners).

TABLE OF CONTENTS

	Pages
Questions Presented For Review	i
Additional Statutory Provisions Involved	1
Statement of the Case	2
Summary of Argument	3
Argument	
I. THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT PROPERLY CONCLUDED THAT RESPONDENT HAD A LEGITIMATE CLAIM OF ENTITLEMENT TO CONTINUED EMPLOYMENT FOR ONE (1) MORE YEAR.	8
A. THE ILLINOIS SCHOOL CODE DOES NOT PROHIBIT A TWO (2) YEAR CONTRACT WITH A PROBATIONARY TEACHER.	8
B. THE RESPONDENT HAS A LEGITIMATE CLAIM OF ENTITLEMENT UNDER THE CONSTITUTION AND CIVIL RIGHTS ACT EVEN IN THE ABSENCE OF AN ENFORCEABLE CONTRACT RIGHT UNDER STATE LAW.	11
II. THE ILLINOIS STATUTORY TENURE SYSTEM DOES NOT PRECLUDE RESPONDENT'S CLAIM OF ENTITLEMENT TO A SECOND YEAR OF PROBATIONARY EMPLOYMENT.	20
III. *PARRATT v. TAYLOR*, 451 U. S. 527, 101 S. Ct. 1908 (1981), DOES NOT FORECLOSE RESPONDENT'S CLAIM BECAUSE A PRE-DEPRIVATION HEARING WAS PRACTICAL AND POST-DEPRIVATION REMEDIES ARE INADEQUATE AND SPECULATIVE.	23

TABLE OF CONTENTS—Continued

Pages

A. ASSUMING RESPONDENT HAS AN ENFORCEABLE BREACH OF CONTRACT CLAIM, THIS FACT ALONE WOULD NOT SATISFY THE REQUIREMENTS OF DUE PROCESS WHERE A PREDEPRIVATION HEARING IS BOTH FEASIBLE AND PRACTICAL. 23

B. RESPONDENT'S POST-DEPRIVATION REMEDIES ARE INADEQUATE AND SPECULATIVE. 29

Conclusion 30

TABLE OF AUTHORITIES

CASES CITED

Bertot v. School District No. 1, Albany County, Wyoming, 522 F. 2d 1171 (10th Cir. 1975) 17

Bishop v. Wood, 426 U. S. 341, 96 S. Ct. 2074 (1976) 4, 11, 14, 16, 21

Bessler v. Board of Education, 69 Ill. 2d 191, 370 N. E. 2d 1050 (1977) 30

Board of Education (Chicago) v. Chicago Teachers Union Local 1, 26 Ill. App. 3d 806, 326 N. E. 2d 158 (1st Dist. 1975) 10

Board of Regents v. Roth, 408 U. S. 564, 92 S. Ct. 2701 (1972) 6, 7, 12, 14, 15, 16, 17, 19, 20, 21

Boddie v. Connecticut, 401 U. S. 371 (1971) 32

Bollow v. Federal Reserve Bank of San Francisco, 650 F. 2d 1093 (9th Cir. 1981) 18, 19

TABLE OF AUTHORITIES—Continued

Pages

Cafeteria Workers v. McElroy, 367 U. S. 886, 81 S. Ct. 1743 (1961) 15

Carey v. Piphus, 435 U. S. 247, 98 S. Ct. 1042 (1978) 31, 32

Coleman v. Turpen, 697 F. 2d 1341 (10th Cir. 1982) 24

Cusumano v. Ratchford, 507 F. 2d 980 (8th Cir. 1974) 17

Goss v. Lopez, 419 U. S. 565, 95 S. Ct. 729 (1978) 13, 15

Haimowitz v. University of Nevada, 579 F. 2d 526 (9th Cir. 1978) 17

Hostrop v. Board of Junior College District No. 515, 471 F. 2d 488 (1975) 31

Hostrop v. Board of Junior College District No. 515, 523 F. 2d 569 (7th Cir. 1975), *cert. den.* 425 U. S. 963, 96 S. Ct. 1748 (1976) 9, 10

Leis v. Flynt, 439 U. S. 438, 99 S. Ct. 698 (1979) (per curiam) 6, 14, 16, 17, 21

Libertyville Education Association v. Board of Education of School District No. 70, Lake County, 56 Ill. App. 3d 503, 371 N. E. 2d 676 (2nd Dist. 1977) 10

Logan v. Zimmerman Brush Co., 455 U. S. 422, 102 S. Ct. 1148 (1982) 13, 25, 26, 27, 28, 30

McCoy v. Gordon, 709 F. 2d 1060 (5th Cir. 1983) 24

McElearney v. University of Illinois, 612 F. 2d 285 (7th Cir. 1979) 17

Mack v. Cape Elizabeth School Board, 553 F. 2d 720 (1st Cir. 1977) 18

Mathews v. Eldridge, 424 U. S. 319, 96 S. Ct. 893 (1976) 26, 29, 32

Memphis Light, Gas & Water Division v. Craft, 436 U. S. 1, 98 S. Ct. 1554 (1978) 6, 12, 13, 29

TABLE OF AUTHORITIES—Continued

Pages

Monnell v. Department of Social Services, 436 U. S. 658, 98 S. Ct. 2018 (1978) 18, 25, 27

Moore v. Otero, 557 F. 2d 435 (5th Cir. 1977) 18

Mt. Healthy Board of Education v. Doyle, 429 U. S. 274, 97 S. Ct. 568 (1977) 32

O'Bannon v. Town Court Nursing Center, 447 U. S. 773 (1979) (Blackmun, J., concurring) 17

Palmer v. Hudson, 697 F. 2d 1220 (4th Cir. 1983) 25

Parratt v. Taylor, 451 U. S. 527, 101 S. Ct. 1908 (1981) ..... 7, 24, *passim*

Paul v. Davis, 424 U. S. 693, 96 S. Ct. 1155 (1976) 30

Perry v. Sindermann, 408 U. S. 593, 92 S. Ct. 2694 (1972) 6, 7, 14, 15, 16, 17, 18

Plummer v. Board of Regents, 552 F. 2d 716 (6th Cir. 1977) 17

Quinn v. Syracuse Model Neighborhood Corp., 613 F. 2d 438 (2nd Cir. 1980) 18

Rutherford v. United States, 702 F. 2d 580 (5th Cir. 1983) 30

Ryan v. Aurora Board of Education, 540 F. 2d 222 (6th Cir. 1976) 17, 18, 22

Soni v. Board of Trustees of University of Tennessee, 513 F. 2d 347 (6th Cir. 1975) 15, 17, 20

Stebbins v. Weaver, 537 F. 2d 939 (7th Cir. 1976), cert. den., 429 U. S. 1041 (1977) 17

Thomas v. Ward, 529 F. 2d 916 (4th Cir. 1975) 17

Vail v. Board of Education of Paris Union School District No. 95, et al., 706 F. 2d 1435 (7th Cir. 1983) 3, 7, 10, 11, 25, 28, 30

TABLE OF AUTHORITIES—Continued

Pages

Ventetuolo v. Burke, 470 F. Supp. 887 (D.R.I., 1978), *aff'd.* 596 F. 2d 476 (1st Cir. 1979) 18, 19

Weiss v. Lehman, 676 F. 2d 1320 (9th Cir. 1982) 24, 30

Winkler v. County of DeKalb, 648 F. 2d 411 (5th Cir. 1981) 12

Wolf-Lillie v. Sonquist, 699 F. 2d 864 (7th Cir. 1983) 24

TEXTS CITED

Monaghan, *Of "Liberty" and "Property,"* 62 Cornell L. Rev. 405 (1977) 12

L. Tribe, *American Constitutional Law*, Sections 10-7 to 10-9 (1978) 13

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Illinois Revised Statutes (1981) Chapter 122, Section 10-20 2

Illinois Revised Statutes (1981) Chapter 122, Section 10-20.7 ..... 2, 3, 9, 10

Illinois Revised Statutes (1981) Chapter 122, Section 10-21 2

Illinois Revised Statutes (1981) Chapter 122, Section 10-21.1 ..... 2, 3, 9, 10

Illinois Revised Statutes (1981) Chapter 122, Section 24-11 ..... 10, 11, 22, 26

Illinois Revised Statutes (1981) Chapter 122, Section 24-12 26

No. 83-87

In The

Supreme Court of the United States

October Term, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,

Petitioners,

vs.

JESSE A. VAIL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In addition to those constitutional and statutory provisions included in Petitioners' Brief, the following statutory provisions are involved:

Illinois Revised Statutes (1981) Chapter 122:

10-20. *Duties of the School Board.* The School Board has the duties enumerated in Sections 10-20.1 through 10-20.30.

10-20.7. *Appoint Teachers and Fix Salaries.* To appoint all teachers and fix the amounts of their salaries, subject to limitations set forth in this Act.

10-21. *Additional Duties of the Board.* Boards of Education in addition to the duties enumerated above, shall have the additional duties enumerated in Sections 10-21.1 through 10-21.6.

10-21.1. *Employment of Teachers.* To examine teachers by examinations supplemental to any other examinations and to employ teachers and fix the amount of their salaries subject to limitations set forth in this Act.

STATEMENT OF THE CASE

Respondent accepts Petitioners' discussion of the facts contained in their Statement (of the case), except for one glaring omission: they failed to note that Respondent *accepted* their explicit offer of two (2) years' employment, thereby creating a contractual commitment. Following that acceptance, Respondent left his residence in Joliet, Illinois, where he and his family had lived for thirteen (13) years, left a job he had held for ten (10) years, and took a salary cut to assume the position in Paris, Illinois.

Respondent also objects to the portion of Petitioners' Statement (Brief, p. 3), which discusses selected pro-

visions of Illinois' School Code and statutory tenure scheme. That discussion omits reference to the general grant of authority to Petitioners to "appoint all teachers and fix the amount of their salaries, subject to the limitations set forth in this Act." *Ill. Rev. Stat.* (1981) Chapter 122, Section 10-20.7 and Section 10-21.1. The Illinois School Code contains no time limitations on the contracts to be offered to probationary teachers.

Respondent accepts the balance of Petitioners' Statement (of the case).

SUMMARY OF ARGUMENT

The Court of Appeals for the Seventh Circuit affirmed the finding of the trial court that Petitioners' "commitment" to provide the Respondent with a two (2) year term of employment constituted a "property" interest protectable under due process. The finding was affirmed on alternate grounds that (1) the Illinois School Code[1] itself permitted such a two (2) year commitment, thereby giving the Respondent an enforceable contract right, *Vail v. Board of Education of Paris Union School District No. 95*, 706 F. 2d 1435, 1438-40 (7th Cir. 1983) [hereinafter *"Vail"*] and (2) even in the absence of such an enforceable contract right under state law, the mutually explicit understanding of the parties was sufficient to create a legitimate claim of entitlement under the Con-

[1]The Illinois School Code is found at *Ill. Rev. Stat.* (1981) Chapter 122, Section 1-1, *et seq.* It will be referred to in this Brief as the "School Code" or the "Code."

stitution and Civil Rights Act. *Id.* at 1440-41. The first two sections of Petitioners' argument are directed at challenging this finding.

I. In the first part of their argument, Petitioners assert that their two (2) year offer was unauthorized by *state* law. They then conclude—without argument or explanation—that Respondent is thereby precluded from asserting a federal claim. The interpretation of the Illinois School Code by the Court of Appeals for the Seventh Circuit was based on extensive briefing and argument by the parties. The School Code does not specifically address this issue, and there are no state Supreme Court or lower court opinions even discussing the issue. The Court of Appeals for the Seventh Circuit has on numerous occasions construed and interpreted various provisions of the Illinois School Code. Under comparable circumstances, this Court has accepted the interpretation of state law in the lower court opinion, even if an examination of the state law issue without such guidance might have justified a different conclusion. *See, e. g., Bishop v. Wood*, 426 U. S. 341, 345-6, 96 S. Ct. 2074, 2078 (1976) (and footnote 10 therein). In any event, the finding of the Court of Appeals that the Petitioners' two (2) year offer was not prohibited by the Code is clearly supported by the language of the Code and its legislative history. See argument below.

More significant to this appeal is Petitioners' unstated assumption that state law alone determines the legitimacy of claims of entitlement under the Constitution and Civil Rights Act. This assumption raises the issue of whether, on the facts presented, the Respondent had a right — under the Constitution and Civil Rights

Act — to rely on the promises of the highest officials of local government. The following question of law is raised: Can the actions of the highest officials of local government, taken under color of law, generate a legitimate claim of entitlement amounting to a "property" interest under the Due Process Clause and Civil Rights Act? Under these circumstances, we must distinguish between the underlying Constitutional right to be free from arbitrary actions by government officials, and the specific "property" right which the Respondent seeks to protect, i. e., a legitimate claim of entitlement to two (2) years' employment; a claim which was not created by the Constitution, but rather was created by "an independent source such as state law," to-wit: the (arbitrary) actions of the governing authorities—taken under color of law—which created a reasonable expectation on the part of the Respondent.

In this portion of the Brief, Respondent will first address the question of the authority under state law for the offer of two (2) years of probationary employment, which could clearly form a basis for the creation of a "property" interest under due process, and then address the question of whether actions of high level government officials taken under *color* of law are sufficient to create a protectable interest under the Due Process Clause.

The Petitioners offered and Respondent accepted employment for a two (2) year term. They then terminated him *during* his two (2) year term—without stated cause and without a hearing. Regardless of whether Petitioners had actual authority under state law to extend an offer of two (2) years employment to Respondent, the evidence clearly supports the finding that Respondent

had a "legitimate claim of entitlement" under federal constitutional law based on the mutually explicit understanding of the parties that he would be employed for two (2) years. *Leis v. Flynt*, 439 U. S. 438, 99 S. Ct. 698 (1979); *Perry v. Sindermann*, 408 U. S. 493, 92 S. Ct. 2694 (1972); *Board of Regents v. Roth*, 408 U. S. 564, 92 S. Ct. 2701 (1972). Federal constitutional law is not totally dependent on or subordinate to state law in determining the legitimacy of claims of entitlement under the Due Process Clause. As stated in *Memphis Light, Gas & Water Division v. Craft*, 436 U. S. 1, 9, 98 S. Ct. 1554, 1560 (1978) (citations to *Roth* omitted):

> Although the underlying substantive interest is created by "an independent source such as state law", federal constitutional law determines whether that interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause.

A contrary ruling would have grave implications, for it would not only condone certain types of arbitrary government action, it would raise it to the level of a defense to a due process claim.

II. While Petitioners assume in the first portion of their brief that Respondent must have a contract right enforceable under *state* law in order to assert a federal claim, in the second portion of their Brief they argue that an enforceable contract right would be *insufficient* to state a federal claim. Although Respondent does not claim (and has never claimed) tenure, Petitioners seem to argue that no interest other than tenure—whether contractual or otherwise—can constitute a protectable interest under federal law, when a statutory tenure system is in operation.

It is Respondent's position that under the teachings of *Roth* and *Sindermann*, tenure is *not* the only conceiv-

able protectable interest in academia, and that the legitimacy of claims of entitlement cannot and should not be limited to a few rigid, technical forms, especially where those claims arise out of mutually explicit understandings with governing authorities which do not contradict or infringe on statutory benefit schemes. *Roth*; *Sindermann*. Where a claim of entitlement is supported by state statute or rule, its legitimacy is self-evident. Its legitimacy is also established where the claim of entitlement arises out of legitimate and reasonable reliance on a mutually explicit understanding with the highest governing authorities—acting under color of law—that does not conflict with statutory benefit schemes. *Roth; Sindermann*. Were it otherwise, the arbitrary[2] actions of government officials would be transformed from the gist of a due process claim to a defense of such claim. Neither the Constitution nor the cases dictate such a result.

III. In the third portion of their argument, Petitioners actually incorporate by reference the dissenting appellate judge's opinion in *Vail* on the significance of *Parratt v. Taylor*, 451 U. S. 527, 101 S. Ct. 1908 (1981) to this case. Though they initially argued that Respondent had no enforceable contract right under state law, they now imply that he has an adequate state common law remedy for breach of contract which is sufficient to satisfy due process. It is Respondent's position that even if he had an enforceable breach of contract claim, this fact alone would not satisfy the requirements of due process under *Parratt* where a predeprivation hearing is both feasible and practical.

---

[2]Arbitrary in the sense that they are unauthorized by state law.

ARGUMENT

I. The Court Of Appeals For The Seventh Circuit Properly Concluded That Respondent Had A Legitimate Claim Of Entitlement To Continued Employment For One (1) More Year.

Petitioners argue, contrary to the finding of the Court of Appeals for the Seventh Circuit, that under the Illinois School Code, probationary teachers are limited to two (2) "separate" one (1) year contracts in completing the two (2) year probationary term (Brief, pp. 7, 15). This issue of statutory construction was thoroughly briefed and argued in the appeal below. If this Honorable Court affirms the decision of the Court of Appeals for the Seventh Circuit on this issue, it follows that Respondent had a contract right, which clearly constitutes a protectable property interest under the Constitution and Civil Rights Acts.

A. The Illinois School Code Does Not Prohibit A Two (2) Year Contract With A Probationary Teacher.

In claiming error on this point, Petitioners argue that they exceeded their own powers in extending the two (2) year offer, and that the School Code limits probationary teacher contracts to two (2) "separate" one (1) year terms. The Illinois School Code does not specifically address the issue of School Board authority to offer a two (2) year probationary term, such as was offered to Respondent in this case. Petitioners admit that the Illinois Supreme Court has yet to rule on the issue (Brief, p. 18).

There are no reported opinions discussing the issue.[3] In the absence of express statutory provisions or controlling judicial construction, they cite state appellate court opinions discussing general principles of statutory construction and legislative intent, none of which even discuss this issue.

The Illinois School Code contains a general grant of authority to school boards to "appoint all teachers and fix the amount of their salaries, *subject to the limitations set forth in this Act.*" (emphasis supplied). *Ill. Rev. Stat.* (1981) Chapter 122, Section 10-20.7 and Section 10-21.1. While there are several express statutory time limits in the School Code relating to specific types of contracts,[4] there is no provision in the Code placing an express statutory time limit on contracts to be offered to probationary teachers. This stands in contrast to express restrictions placed on the parallel grant of power to the Chicago Board of Education under Section 34-16 of the Code. That restriction is expressly stated in Section 34-49, limiting the power of the Board to enter into employ-

---

[3]The Seventh Circuit's opinion in *Hostrop v. Board of Junior College District No. 515*, 523 F. 2d 569 (7th Cir. 1975), *cert. den.* 425 U. S. 963, 96 S. Ct. 1748 (1976), suggests that such authority exists, citing several early Illinois Supreme Court opinions at 574-75.

[4]§§10-22.11, 10-22.12, and 10-22.35a relating to leases and purchases of school property; § 10-22.25a relating to installment contract purchases of personal property; § 10-22.31 relating to special education cooperative agreements; § 10-22.31a relating to other joint educational agreements; § 10-22.34b relating to utilization of non-certified personnel; § 10-23.4 relating to purchase of school buses; § 10-23.4a relating to leasing of equipment and machinery; §10-24-6.1 relating to teacher sabbatical leaves.

ment contracts with individuals or groups of employees for any period exceeding three (3) years.[5]

These comparisons of provisions in the School Code indicate that the grant of authority in Sections 10-20.7 and 10-21.1 is not subject to any one (1) year limitation. *See Libertyville Education Association v. Board of Education of School District No. 70, Lake County*, 56 Ill. App. 3d 503, 371 N. E. 2d 676 (2nd Dist. 1977). The *Libertyville* case acknowledges the earlier holding of the Court of Appeals for the Seventh Circuit in *Hostrop v. Board of Junior College District No. 515*, 523 F. 2d 569, 574-75 (7th Cir. 1975), *cert. den.* 425 U. S. 963, 96 S. Ct. 1748 (1976), that passage of the modern tenure provisions of the Illinois School Code was not intended to reinstate the limitations on duration of employment contracts established under earlier School Codes in the last century. *Id.*, at 506, 371 N. E. 2d at 678.

It must be emphasized that the Respondent does not claim any right to tenure under the Illinois School Code. He merely claims an agreement for a two (2) year probationary term as promised by the Petitioners. As found by the Court of Appeals for the Seventh Circuit, the School Code contemplates just such a two (2) year probationary period in Section 24-11. *Vail*, 706 F. 2d at 1439.

The only statutory language invoked by Petitioners to support a one (1) year limitation on their authority is contained in later paragraphs of Section 24-11 delineating the procedure by which a one (1) year probationary

---

[5]This was originally a one (1) year limitation. It was amended to three (3) years after some critical comments on any such restriction in *Board of Education (Chicago) v. Chicago Teachers Union Local 1*, 26 Ill. App. 3d 806, 326 N. E. 2d 158 (1st Dist. 1975).

teacher may be "re-employed." See Section 24-11. Its application is clearly limited to procedures for termination at the *end* of a term of employment, and would have no application to termination *during* a term of employment, such as occurred in the case at bar. It does not prohibit or even suggest that a two (2) year contract is not permitted under the Code. *Vail*, 706 F. 2d at 1439.

Respondent submits that, in the absence of express statutory direction or controlling state authorities, this Court should accept the interpretation of state law by the District Court and the Court of Appeals for the Seventh Circuit, as it has generally done in prior cases under comparable circumstances. *See, e. g., Bishop v. Wood*, 426 U. S. 341, 345-46, 96 S. Ct. 2074, 2078, fn. 10 (1976).

B. The Respondent Has A Legitimate Claim Of Entitlement Under The Constitution And Civil Rights Acts Even In The Absence Of An Enforceable Contract Right Under State Law.

Even assuming *arguendo* that the Petitioners' two (2) year offer was without authority in state law, Respondent contends that he has established a "legitimate claim of entitlement" under the Due Process Clause and Section 1983.

Although Petitioners have chosen to raise an issue of interpretation and construction of an unresolved question of state law, more important to this Court's review is their assumption[4] that state law alone determines the

---

[4]In their appeal to the Court of Appeals for the Seventh Circuit, Petitioners expressly argued that a claimant must have a contract right enforceable under state law before he could assert a federal claim.

legitimacy of federal Constitutional claims. In this case, the Petitioners promised and agreed to employ the Respondent for a term of two (2) years. They now argue that they had no authority in *state* law to do precisely what they did. They then assume—without argument or explanation and in spite of the mutually explicit understanding of the parties—that because their own action was prohibited by state law, Respondent has no claim under federal law. The implication that Respondent's federal claim is totally dependent upon provisions of state law disregards this Court's admonition that:

> Although the underlying substantive interest is created by "an independent source such as state law," federal constitutional law determines whether that interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause.

Memphis Light, Gas & Water Division v. Craft, 436 U. S. 1, 9, 98 S. Ct. 1554, 1560 (1978) (citations to *Roth* omitted). *See, generally*, Monaghan, *Of "Liberty" and "Property,"* 62 Cornell L. Rev. 405, 434-44 (1977).

In effect, Petitioners are attempting to use their own violation of state law as a defense to Respondent's federal civil rights claim. If their argument were to become law, then the arbitrary actions of the highest governing officials, though taken under color of law, would be insulated from constitutional scrutiny by the very fact that such actions were unauthorized by state law. This would transform the gist of a due process claim into a defense of such a claim. The result would subordinate the Constitution to state law. Neither the Constitution nor the cases dictates such a result.

1. *A mutually explicit understanding with governing authorities can create a legitimate claim of entitlement under the due process clause.*

The procedural safeguards of due process "have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on *arbitrary* government action." L. Tribe, *American Constitutional Law*, Sections 10-7 to 10-9 (1978) (emphasis supplied). *See, e. g., Goss v. Lopez*, 419 U. S. 565, 574, 95 S. Ct. 729, 736 (1978). Arbitrary government action can take many forms. Though it might typically occur in the deprivation of some recognized benefit, the case at bar evidences another type of arbitrary action, to-wit: creation of a legitimate expectation through a mutually explicit understanding, followed by its deprivation in violation of such explicit understanding. Because arbitrary government action can create as well as deprive one of expectations of entitlement, the Due Process Clause must reach deprivation of such *arbitrarily created* expectations if they amount to "legitimate claims of entitlement." The Due Process Clause should not condone arbitrary action in creation of a legitimate expectation while prohibiting such action in its deprivation. To assure that the Due Process Clause will be an effective check on arbitrary government action, this Court should reaffirm the admonition in the *Memphis Light* case that the legitimacy of a claim of entitlement under the Due Process Clause will be determined by federal Constitutional law, not state law. *Id.* at 9, 98 S. Ct. at 1560. *Cf. Logan v. Zimmerman Brush Co.*, 455 U. S. 422, 102 S. Ct. 1148 (1982) (State statutory procedures which deprive one of a state-created entitlement must be analyzed in constitutional terms.)

This does not indicate or imply that such claims of entitlement can be created by the Constitution or federal law.

It is well established that such claims must be created "by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U. S. 564, 577, 92 S. Ct. 2701, 2709 (1972). Further, in order to support a claim of entitlement based on an understanding, such understanding must be "mutually explicit." *Perry v. Sindermann*, 408 U. S. 593, 601, 92 S. Ct. 2694, 2699 (1972).

Following *Roth* and *Sindermann*, this Court has indicated that a mutually explicit understanding can be a source of a legitimate claim of entitlement. In *Leis v. Flynt*, 439 U. S. 438, 442, 99 S. Ct. 698, 701 (1979), the Court cited *Sindermann* in reiterating that a claim of entitlement may be "derived from statute *or* legal rule *or* through mutually explicit understanding" (emphasis supplied). *Flynt* rejected a contention that Respondents were entitled to appear *pro hac vice* before an Ohio trial court, because they had not shown the "requisite *mutual* understanding" (*Flynt*, 439 U. S. at 443, 99 S. Ct. at 701). The Court's opinion indicated that Respondents would have prevailed, despite express provisions of state law vesting the trial court with discretion in approving such appearances, if Respondents had been able to show such a *mutual* understanding.[7]

---

[7]Petitioners' argument in the case at bar, that this Court found it "unnecessary" (Brief, p. 25) to reach this "factual" issue in *Flynt*, finds no support in the Court's language. The record was simply "devoid" of any evidence to support such a finding. *Id.* at 442, 99 S. Ct. at 701. Likewise, Petitioners' reliance on *Bishop v. Wood*, 426 U. S. 341, 96 S. Ct. 2074 (1976) is misplaced because the issue was not raised by the evidence.

"[T]he interpretation and application of the Due Process Clause are intensely practical matters. . . 'the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation'. *Cafeteria Workers v. McElroy*, 367 U. S. 886, 895, 81 S. Ct. 1743, 1748 (1961)." *Goss v. Lopez*, 419 U. S. 565, 574, 95 S. Ct. 729, 736 (1975). To hold that mutually explicit understandings need not be authorized by state law in order to create legitimate claims of entitlement under federal law will confirm the supremacy of federal over state law, preclude reliance on arbitrary government action as a defense to a due process claim, and assure the effectiveness of the Due Process Clause in reaching all types of arbitrary government action.

In this case, the source of Respondent's claim of entitlement was the Petitioners' offer of two (2) years of employment. That offer, whether or not authorized by state law, generated the requisite mutually explicit understanding relied on by Respondent. The question remains as to whether that mutually explicit understanding is sufficient, under the circumstances of this case, to constitute a "legitimate claim of entitlement." See *Sindermann*, 408 U. S. at 602-3, 92 S. Ct. at 2700. The question of whether the understanding was authorized by state law is "but one factor" to be considered in determining the legitimacy of Respondent's claim. *Soni v. Board of Trustees of University of Tennessee*, 513 F. 2d 347, 351 (6th Cir. 1975).

2. *Determining Legitimacy of Claims of Entitlement.*

The starting point for an analysis of the issue of legitimacy of claims of entitlement is Justice Stewart's language in *Roth* (408 U. S. at 577, 92 S. Ct. at 2709):

> To have a property interest in a benefit, a person must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Most significant to the case at bar, Justice Stewart identified the "purpose of the ancient institution of property":

> . . . to protect those claims upon which people *rely* in their daily lives, *reliance* that must not be arbitrarily undermined. (*Id.*) (emphasis supplied)

As further explained, a claim of entitlement must

> stem from an independent source such as state law —rules *or understandings* that secure certain benefits and that support claims of entitlement to those benefits. (*Id.*) (emphasis supplied)

In *Sindermann,* it was explained that such understandings must be "mutually explicit" in order to create a legitimate claim of entitlement. 408 U. S. at 601, 92 S. Ct. at 2699.

Since this Court's opinions in *Roth* and *Sindermann,* a great number of cases have discussed the legitimacy of claims of entitlement in Section 1983 actions. Where the basis or source of a claim of entitlement is in state statute or legal rule, the Court's consideration of legitimacy has been so limited. *See, e.g., Bishop v. Wood,* 426 U. S. 341, 96 S. Ct. 2074 (1976) and *Leis v. Flynt,* 439 U. S. 438, 99 S. Ct. 698 (1979) (*per curiam*). Where, however, the claimant relies on a mutually explicit understanding with government officials acting under color of law, the analysis of the issue should not be so limited. As has been said under similar circumstances, the "inquiry should be broad-gauged. Reason and *shared* expectations should be consulted to define the scope of the claimant's 'justifiable'

expectations." *O'Bannon v. Town Court Nursing Center*, 447 U. S. 773, 797 (1979) (Blackmun, J., concurring) (emphasis supplied). *See also Soni v. Board of Trustees of University of Tennessee*, 513 F. 2d 347 (6th Cir. 1975); *Thomas v. Ward*, 529 F. 2d 916 (4th Cir. 1975). A review of lower court opinions discloses certain factors which are useful in evaluating the legitimacy of claims of entitlement founded on mutually explicit understandings with government officials acting under color of law.[8]

First and foremost, as stated in *Flynt*, *Roth* and *Sindermann*, there must be a "mutually explicit understanding." Mere informal assurances will not suffice.[9] Further, that understanding must create an existing status, not promise some future status.[10] Additionally, to be legitimate, the understanding relied on by the claimant must

---

[8]In their Brief, Petitioners assert (at p. 24, fn. 6) that a number of federal courts of appeals' decisions since *Roth* and *Sindermann* which deny claims of entitlement are based on the fact that the claims were "at odds" with statute or rule. This oversimplification will not withstand analysis of the cases, most of which did not involve explicit understandings with governing authorities to support the legitimacy of the claims of entitlement, or involved other factors which prohibited a finding of legitimacy.

[9]*See, e. g., McElearney v. University of Illinois*, 612 F. 2d 285 (7th Cir. 1979); *Stebbins v. Weaver*, 537 F. 2d 939 (7th Cir. 1976), *cert. den.*, 429 U. S. 1041 (1977); *Haimowitz v. University of Nevada*, 579 F. 2d 526 (9th Cir. 1978); *Bertot v. School District No. 1, Albany County, Wyoming*, 522 F. 2d 1171 (10th Cir. 1975); *Cusumano v. Ratchford*, 507 F. 2d 980 (8th Cir. 1974).

[10]*McElearney; Haimowitz; Ryan v. Aurora Board of Education*, 540 F. 2d 222 (6th Cir. 1976); *Plummer v. Board of Regents*, 552 F. 2d 716 (6th Cir. 1977); *Bertot; Cusumano.*

be fostered by governing authorities.[11] A claimant could not legitimately rely on assurances from a government official who, under the circumstances, is clearly not authorized to extend such assurances, whether by his own level of authority, or by other indications of lack of authority.[12]

Provisions of state law, though not conclusive, are relevant in determining the legitimacy of claims of entitlement based on mutually explicit understandings. Where such explicit understandings clearly contradict higher authority, e.g., statute of rule, they may be insufficient to support a finding of legitimacy.[13] Where, however, the understanding is not clearly inconsistent with existing statutory benefit schemes relating to the benefits at issue,

---

[11]The requirement that the understanding be reached with governing authorities satisfies another requirement of a civil rights action in those claims asserted against the government entity itself. If the understanding is reached by officials whose actions "may fairly be said to constitute official policy," it fulfills the requirement that the state be directly implicated in the wrongful or arbitrary conduct. *See Monnell v. Department of Social Services*, 436 U. S. 658, 692, 98 S. Ct. 2018, 2035-36 (1978). *See also, Quinn v. Syracuse Model Neighborhood Corp.*, 613 F. 2d 438, 448 (2nd Cir. 1980).

[12]*See Bollow v. Federal Reserve Bank of San Francisco*, 650 F. 2d 1093 (9th Cir. 1981); *Ventetuolo v. Burke*, 470 F. Supp. 887 (D. R. I., 1978), *aff'd.* 596 F. 2d 476 (1st Cir. 1979); *Mack v. Cape Elizabeth School Board*, 553 F. 2d 720 (1st Cir. 1977).

[13]*See, e. g., Quinn v. Syracuse Model Neighborhood Corp.*, 613 F. 2d 438, 448 (2nd Cir. 1980) (". . . state law clearly rejects any inference of legitimate entitlement"); *Moore v. Otero*, 557 F. 2d 435, 437 (5th Cir. 1977) (municipal code "could not be clearer that a corporal serves . . . at the pleasure of the chief of police"). *See also, Ryan v. Aurora Board of Education*, 540 F. 2d 222 (6th Cir. 1976) (where assurances of statutory tenure were in conflict with clear language of statute).

a finding of legitimacy should be upheld.[14] This is especially true where the understanding is reached with the highest governing authorities.[15]

3. *Analysis of the Case at Bar.*

All of the concepts discussed in the above analysis reside in the profound words of Justice Stewart originally quoted above from *Roth:*

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those *claims upon which people rely in their daily lives*, reliance that must not be *arbitrarily* undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

408 U. S. at 577, 92 S. Ct. at 2709 (emphasis supplied).

---

[14]This analysis of the relevance of state law explains the intent behind Justice Stewart's comment in Footnote 7 of the *Roth* opinion at 408 U. S. at 602, 92 S. Ct. at 2700; for if it were clear under the law of Texas that a teacher in respondent's position had no contractual or other claim to job tenure, the legitimacy of respondent's claim would have been destroyed. *See also Soni v. Board of Trustees of University of Tennessee*, 513 F. 2d 347 (6th Cir. 1975) (where claimant, an alien, was assured of continued employment by governing authorities, despite state law and university regulations which *all parties understood* would prohibit an alien from obtaining statutory tenure; Held: legitimate claim of entitlement was established).

[15]Respondent has been unable to locate any cases where the mutual understanding involved the highest officials of local government. *Cf. Ventetuolo v. Burke*, 596 F. 2d 476, 481 (1st Cir. 1979) (where claimant "knew or should have known that the director did not have the authority [claimant] sought to impute to him."). *But cf., Bollow v. Federal Reserve Bank of San Francisco*, 650 F. 2d 1093, 1099-1100 (9th Cir. 1981) (where, in a claim against federal authorities, the court said that "anyone who deals with the government assumes the risk that the agent acting in the government's behalf has exceeded the bounds of his authority.").

In the case at bar, the Respondent relies on a mutually explicit understanding creating an existing status. Because the understanding was fostered by the highest governing authorities, and did not clearly contradict or infringe on existing statutory benefit schemes, the legitimacy of Respondent's claim of entitlement is established. Petitioners' unstated assumption that state law alone will determine whether Respondent has a legitimate claim of entitlement under federal law must be rejected.

II. The Illinois Statutory Tenure System Does Not Preclude Respondent's Claim Of Entitlement To A Second Year Of Probationary Employment.

While Petitioners assume in the first portion of their argument that Respondent must have a contract right enforceable under state law in order to assert a federal claim, in the second portion of their argument they assert that an enforceable contract right would be insufficient to state a federal claim. Although Respondent does not claim (and has never claimed) tenure, Petitioners apparently argue that where a statutory tenure scheme exists, no property interest other than tenure—whether contractual or otherwise—can constitute a protectable interest under federal law. It is Respondent's position that tenure is *not* the only conceivable protectable interest in academia, and the legitimacy of claims of entitlement cannot and should not be limited to such a rigid, technical form, especially where those claims arise out of mutually explicit understandings

with governing authorities that do not clearly contradict or infringe on statutory benefit schemes. See argument above.

It is difficult to discern the gist of Petitioners' argument in this portion of their Brief. On the one hand, they assume for this portion of their argument that a two (2) year probationary contract is authorized under Illinois law (Brief, pp. 8, 22). Yet, on the other hand, they argue that they do not have the "authority or power to enlarge the limits of teacher tenure beyond statutory limits." (Brief, p. 9). This argument seems to miss the point entirely. Petitioners did not promise and Respondent does not claim entitlement to tenure. Therefore, their actions in offering him a two (2) year probationary contract did not "enlarge the limits of teacher tenure beyond statutory limits." (Brief, p. 9)

To the extent that Petitioners attempt to argue lack of authority to extend a two (2) year commitment, it is inconsistent with their threshold assumption that a two (2) year probationary contract is permitted. Further, the lack of authority argument was analyzed and refuted earlier in this Brief.

Petitioners rely in this portion of their argument on *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074 (1976) and *Leis v. Flynt*, 439 U.S. 438, 99 S.Ct. 698 (1979) (*per curiam*). Both cases are easily distinguishable as not involving mutually explicit understandings. The claimant in *Bishop* relied only on statutes and length of service. *Id.*, 426 U.S. at 344, 96 S.Ct. at 2077. He did not allege any mutually explicit understanding. Likewise in *Flynt*, the claimants relied on long-standing practices in exercis-

ing expressly retained discretion. *Id.*, 439 U.S. at 441, 99 S.Ct. at 700. No law *or* mutually explicit understanding supported their claim.

Petitioners' also cite *Ryan v. Aurora Board of Education*, 540 F. 2d 222 (6th Cir. 1976), again apparently arguing that legitimate claims of entitlement must be based solely in statutory authority. As pointed out by Respondent in his Brief in Opposition to Petition for Certiorari (p. 8), *Ryan* is easily distinguishable. Unlike the case at bar, where Respondent was terminated without stated cause or hearing *during* his term of employment, the plaintiffs in *Ryan* were simply not rehired at the *conclusion* of their terms of employment. The *Ryan* language relied on and quoted by Petitioners, that he (Ryan) could not have a legitimate claim to "continued employment" in the face of a statutory tenure system (540 F. 2d at 227), refers to a claim of ***indefinite*** continued employment, i.e., tenure, not a *limited* term of employment such as was claimed by Respondent herein. Significantly, a contrary ruling in *Ryan* would have contradicted and effectively overridden Ohio's statutory tenure system. For description, *see Id.*, at 224. In the case at bar, neither Petitioners' promise nor Respondent's right to complete the second year of his limited term of employment would have infringed on the Illinois statutory tenure scheme, which grants tenure upon entering a third continuous year of employment. *Ill. Rev. Stat.* (1981) Chapter 122, Section 24-11. Nor would it have infringed on any other statutory benefit scheme of the Illinois School Code. See argument above.

III. Parratt v. Taylor, 451 U. S. 527, 101 S. Ct. 1908 (1981), Does Not Foreclose Respondent's Claim Because A Predeprivation Hearing Was Practical And Post-Deprivation Remedies Are Inadequate And Speculative.

A. Assuming Respondent Has An Enforceable Breach Of Contract Claim, This Fact Alone Would Not Satisfy The Requirements Of Due Process Where A Predeprivation Hearing Is Both Feasible And Practical.

In the third portion of their Brief, Petitioners actually incorporate by reference the dissenting Appellate Judge's opinion on the significance of *Parratt v. Taylor*, 451 U. S. 527, 101 S. Ct. 1908 (1981), as it might apply to this case. Though they have argued initially that Respondent has no enforceable contract right under state law, they now imply[16] that he has an adequate state common law remedy for breach of contract, which is sufficient to satisfy due process. It is Respondent's position that even if he had an enforceable breach of contract claim, this fact alone would not satisfy the requirements of due process because termination of one's employment requires a predeprivation hearing where feasible and practical.

Parratt represents a recent effort of this Court to clarify judicial analysis of claims which allege facts that are commonly thought to state a common law claim normally dealt with by state courts, but instead, are couched in terms of Constitutional deprivation and relief under

---

[16]Petitioners' language carefully avoids admitting the validity of any state claim.

the Civil Rights Act. *See Parratt*, 451 U. S. at 533, 101 S. Ct. at 1911-12 (Rehnquist, J.). It involved a relatively minor loss of property, based on allegations of negligence on the part of the state.[17] Because the deprivations were unintentional and unauthorized, predeprivation hearings were not practical or feasible. Since the deprivation involved "a tortious loss of . . . property as a result of a random and unauthorized act by a state employee" (*Id.* at 541, 101 S. Ct. at 1915), it was literally "beyond the control of the State." *Id.*, 101 S. Ct. at 1916. These facts, coupled with the existence of an adequate remedy under state law, led the Court to conclude that the requirements of due process were satisfied under these circumstances.

Appellate opinions following *Parratt* have not been consistent in analyzing its holding. One line of cases seems to indicate that *Parratt* precludes *any* procedural due process claim where adequate remedies for redress are available under state law. *E.g., Wolf-Lillie v. Sonquist*, 699 F. 2d 864 (7th Cir. 1983). Another line of cases analyzes procedural due process claims in the first instance in terms of the feasibility or practicality of providing some type of predeprivation process. *E.g., Weiss v. Lehman*, 676 F. 2d 1320 (9th Cir. 1982); *Coleman v. Turpen*, 697 F. 2d 1341 (10th Cir. 1982). *Parratt* has been said to make any intentional deprivation actionable, *McCoy v. Gordon*, 709

---

[17]The facts disclosed that the deprivation was actually attributable to subordinate agents of the state, and a serious question of state action existed. See footnote 3 at *Parratt*, 451 U. S. at 537, 101 S. Ct. at 1913. Because the issue was not developed or preserved at the trial level, the Supreme Court assumed for purposes of its opinion, that this negligence was attributable to the governing authorities of the state. *Id.*

F. 2d 1060 (5th Cir. 1983), and has also been held to make random, unauthorized intentional acts inactionable. *Palmer v. Hudson*, 697 F. 2d 1220 (4th Cir. 1983).[18] Although this Court more recently emphasized the significance of the "practicality" issue, *e. g., Logan v. Zimmerman Brush Company*, 455 U. S. 422, 436, 102 S. Ct. 1148, 1157 (1982), this dichotomy of post-*Parratt* interpretations persists. Compare the concurring opinion of Judge Eschbach in *Vail v. Board of Education of Paris Union School District No. 95*, 706 F. 2d 1435, 1446-49 (7th Cir. 1983), with the dissenting opinion of Judge Posner in *Vail* at 1453-56.

An objective analysis of the *Parratt* opinion discloses the significance of the "practicality" analysis in resolving alleged violations of procedural due process. Nowhere does *Parratt* even hint that the existence of adequate state law remedies will satisfy the requirements of due process under all circumstances of deprivation of protected interests. In fact, the heart of the majority opinion in *Parratt* focused on the distinction between cases where predeprivation hearings were practical and those where such hearings were not practical. *Id.* at 537-40, 101 S. Ct. at 1914-15. *See also, Id.* at 546, 101 S. Ct. at 1918 (Blackmun, J., concurring) ("When it is possible for a State to

---

[18]One might question whether a random, unauthorized intentional deprivation of property could form the basis of a *procedural* due process claim under *Parratt*'s "practicality" analysis. Query: How can the state be expected to provide a predeprivation hearing where the deprivation is effected by the intentional but random and unauthorized act of a low-level state employee? *See, e. g., Palmer v. Hudson*, 697 F. 2d 1220 (4th Cir. 1983). There is also a question of state action under such circumstances. *See Parratt*, 451 U.S. at 537, 101 S. Ct. at 1913, n. 3; *Monnell v. Department of Social Services*, 436 U. S. 658, 98 S. Ct. 2018.

institute procedures to contain and direct the intentional actions of its officials, it should be required, as a matter of due process, to do so.").

Parratt encompasses several different aspects of the "practicality" analysis. Of course, the threshold inquiry must be whether the deprivation is beyond the control of the state. *Id.* at 541, 101 S. Ct. at 1916. The need for rapid state action is another important consideration. *Id.* at 538-40, 101 S. Ct. at 1914-15; *Logan*, 455 U. S. at 436, 102 S. Ct. at 1157. Finally, considerations of practicality encompass a cost/benefit analysis such as originally appeared in *Mathews v. Eldridge*, 424 U. S. 319, 335, 96 S. Ct. 893 (1976). *See Parratt*, 451 U. S. at 541-43, 101 S. Ct. at 1916; *Logan*, 455 U. S. at 434, 102 S. Ct. at 1156.[19]

Deprivations involving a tortious loss of property as a result of a random and unauthorized act of a state employee epitomize those circumstances where a predeprivation hearing is impractical. Such circumstances stand in stark contrast to deprivations resulting from intentional, deliberate, considered actions of governing authorities of the state. *See Parratt*, at 546, 101 S. Ct. at 1918, (Blackmun, J., concurring); *Id.* at 548-49, 101 S. Ct. at 1919-20 (Powell, J., concurring); *Cf. Logan* (established state procedure). It is precisely such affirmative abuses by state officials in the exercise of governmental powers that the

---

[19]There can be no contention that providing Respondent herein with minimal predeprivation procedure would be unduly costly or burdensome to the school district, which already provides statutorily mandated written notice, a statement of cause, and a hearing under similar circumstances, i. e., termination of second year probationary teachers and tenured teachers. *See Ill. Rev. Stat.* (1981) Chapter 122, Sections 24-11 and 24-12.

Civil Rights Act was meant to deter. *See Parratt*, 451 U. S. at 549, 101 S. Ct. at 1920 (Powell, J., concurring).

Judge Posner's dissenting opinion in *Vail* accords controlling significance to the statements in *Parratt* that predeprivation hearings have typically been required where the deprivations were authorized by an "established state procedure." *Vail*, 706 F. 2d at 1454. He posits that Respondent's termination was not accomplished through established state procedure, and therefore, *Parratt* precludes his claim. *Cf. Logan v. Zimmerman Brush Co.*, 455 U. S. 422, 102 S. Ct. 1148 (1982) (claim upheld where deprivation was pursuant to established state procedure).

Attributing controlling significance to "established state procedure" would unduly restrict the import of the *Parratt* decision. Established state procedure is not the *sine qua non* of a valid procedural due process claim. It merely constitutes the most frequent and obvious example of a source of deprivation attributable to (*Monnell v. Department of Social Services*, 436 U. S. 658, 98 S. Ct. 2018 [1978]) and within the control of (*Parratt*) the state. The significance of the state's ability to anticipate and control the deprivation is apparent from the Court's analysis in distinguishing a "tortious loss of . . . property as a result of a random and unauthorized act of a state employee" from "established state procedure." The controlling distinction is said to be the fact that, in the former instance, "the State cannot predict precisely when the loss will occur." *Id.* at 541, 101 S. Ct. at 1915-16.

> It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under "color of law," is

> in almost all cases beyond the control of the State. Indeed, in most cases it is not only impractical, but impossible, to provide a meaningful hearing before the deprivation. (*Id.*)[20]

This analysis clearly demonstrates that the distinguishing factor is the State's ability to predict, anticipate and control the deprivation. *See also, Logan*, 455 U. S. at 434-35, 102 S. Ct. at 1156-57.

All of these aspects of the *Parratt* analysis provide support for the Respondent's claim of entitlement in the case at bar. In the first place, his loss of a job was clearly within the control of the state; indeed, it was "authorized,"[21] i. e., effected intentionally after consideration by the highest governing authorities. No imminent harm or emergency existed which would necessitate immediate government action. The claimant's interest in continued em-

---

[20]Judge Eschbach, in his concurring opinion below, recognized that established state procedure merely exemplifies those circumstances wherein a deprivation is attributable to and within the control of the state. He reasoned that the Petitioners' discretionary action in authorizing the termination established the "procedure" for terminating individuals such as Respondent, which procedure was "to vote on the matter without providing such individuals with a reason for the decision, nor a meaningful opportunity to be heard." *Vail v. Board of Education of Paris Union School District No. 95*, 706 F. 2d 1435, 1448 (7th Cir. 1983) (Eschbach, J., concurring).

[21]Here, as in *Parratt*, "authorized" is used in the sense of authorized by governing officials, i. e., within their ability to control. The decision of Petitioners to offer and then renege on a two (2) year commitment was probably "random" in the sense that it deviated from "established state procedure." When governing authorities deviate from established state procedure, they should take such actions prudently, not arbitrarily.

ployment was substantial, and the requirement of minimal predeprivation process would surely serve as an additional safeguard against wrongful or arbitrary termination. *See Mathews v. Eldridge*, 424 U. S. 319, 335, 96 S. Ct. 893 (1976).[22]

B. Respondent's Post-Deprivation Remedies Are Inadequate And Speculative.

Moreover, to the extent that the adequacy of post-deprivation remedies is a factor in the *Parratt* analysis, the adequacy of the Respondent's remedies herein must be seriously questioned. Because *Parratt* involved a mere property damage claim, the only conceivable remedy under state *or* federal law was money damages. In cases of termination of employment, such as the one at bar, reinstatement is a significant remedy unavailable in state

---

[22]One might question whether predeprivation process, where feasible, must be provided for deprivations of "insubstantial" or "minor" property interests. For example, a deliberate, considered decision by governing authorities to deprive the claimant in *Parratt* of his $23.50 hobby kit could theoretically require some type of predeprivation procedure, i. e., a statement of reasons for the deprivation. *Cf. Memphis Light, Gas and Water Div. v. Craft*, 436 U. S. 1 (1978) (where the Court held that termination of utility services required nothing more than pretermination notice of intent to terminate service and availability of an "informal" conference to discuss disputed matters). Notably, *Parratt* does not attribute any significance to the value or magnitude of the loss. It is submitted that the value or magnitude of a protectable interest should not determine whether its deprivation is worthy of constitutional scrutiny, but only whether a claimant received that process due under the circumstances. *See Parratt*, 451 U. S. at 536-37, 101 S. Ct. at 1913-14; *Mathews v. Eldridge*, 424 U. S. 319, 335, 96 S. Ct. 893 (1976).

court. *See Bessler v. Board of Education*, 69 Ill. 2d 191, 370 N. E. 2d 1050 (1977).[23]

More importantly, Petitioners themselves have argued at length that the Respondent has no enforceable contract right under state law. Therefore, as in *Logan*, a breach of contract suit "is apt to be a lengthy and speculative process." *Logan*, 455 U. S. 422, 102 S. Ct. at 1158. *See also, Rutherford v. United States*, 702 F. 2d 580 (5th Cir. 1983); *Weiss v. Lehman*, 676 F. 2d 1320, 1325-26 (9th Cir. 1982) (Boochever, J. dissenting).

—o—

CONCLUSION

Respondent's procedural due process claim cannot be perceived as a mere "garden variety" contract action seeking damages for its breach. Upholding his due process claim would not "make the Fourteenth Amendment a font of (contract law) to be superimposed upon whatever systems may already be administered by the states." *Paul v. Davis*, 424 U. S. 693, 701, 96 S. Ct. 1155, 1160 (1976). *See also, Parratt v. Taylor*, 451 U. S. 527, 544, 101 S. Ct. 1908, 1917 (1981), and 451 U. S. at 550, 101 S. Ct. at 1920-21 (Powell, J., concurring). The differences between the federal and state interests in this type of claim were described in Judge Eschbach's concurring opinion in *Vail* at 1448, quoting from the earlier decision

---

[23]In the case at bar, the second and final year of Respondent's term had nearly expired by the time the matter reached final judgment, thereby making reinstatement impractical. In other circumstances of wrongful termination of employment, reinstatement could be considered the preferred remedy.

of the Court of Appeals for the Seventh Circuit in *Hostrop v. Board of Junior College District No. 515*, 471 F. 2d 488, 494; n. 15 (1975):

> The fact that plaintiff relies upon his employment contract to establish a property interest worthy of protection through the Due Process Clause does not mean that his only remedy is a contract action in state court. A Civil Rights action based on the deprivation of due process and a contract action to recover damages for a breach are independent remedies. The Civil Rights action based on the deprivation of a property interest established by contract seeks vindication for the arbitrary manner in which a contract was breached. A "garden variety" contract action seeks damages only for the losses caused by the breach once it has occurred in any manner whatsoever. There will be occasions when one action will lie but the other will not, as when the state has grounds to break an employment contract, but does so by violating an employee's due process rights to notice and hearing.

It is important to note that any alleged deprivation of *procedural* due process must include an alleged deprivation of a substantive interest, such as a contract or property right. Such an underlying substantive interest is necessary to invoke procedural due process guarantees. The distinction between the substantive and procedural interests was recognized by this Court in *Carey v. Piphus*, 435 U. S. 247, 98 S. Ct. 1042 (1978), where it was held that one who is deprived of a substantive right *for cause*, but without due process, may only recover those damages from deprivation of the procedural right, and may not recover damages resulting from deprivation of the underlying substantive right.

In the case at bar, the Respondent specifically alleged in his Complaint that his termination was without a hearing *and* "without cause," i. e., alleged both a substantive and a procedural deprivation. (Complaint, Pars. 23, 28; Jt. App., pp. 10, 12). Petitioners' denial of these allegations put the question of "just cause" at issue. The trial court concluded that the record failed to establish just cause. (Findings of Fact, Conclusions of Law, Memorandum Opinion, and Final Order; Petition for Writ of Certiorari, App. 46). Where a plaintiff has established a procedural deprivation of a protectable (substantive) interest, the burden shifts to the defendant to demonstrate that the substantive deprivation was justified. *Carey,* 435 U. S. at 260; *Accord Mt. Healthy Board of Education v. Doyle,* 429 U. S. 274, 287, 97 S. Ct. 568 (1977). These principles indicate that if Petitioners had established just cause for the Respondent's termination at the trial, Respondent's damages would have been limited to those stemming from deprivation of the procedural right. *Carey v. Piphus,* 435 U. S. 247, 98 S. Ct. 1043 (1978).

The flexible guidelines of *Mathews v. Eldridge,* 424 U. S. 319 (1976) provide realistic and practical tools for resolving procedural due process claims. These guidelines take into consideration the value or magnitude of the substantive deprivation. This Court has said that, because of the importance to organized society that procedural due process be observed, see *Boddie v. Connecticut,* 401 U. S. 371, 375 (1971); *Anti-Facist Committee v. McGrath,* 341 U. S. at 171-172 (Frankfurter, J., concurring), such claims should be resolved regardless of the merits of a claimant's substantive assertions. *Carey v.*

Piphus, 435 U. S. 247, 266 (1977). For the same reasons, such claims should be resolved regardless of the value of the substantive assertion.

For all of the above and foregoing reasons, the judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

MARC J. ANSEL

MARC J. ANSEL, ESQ.
ERWIN, MARTINKUS, COLE & ANSEL, LTD.
Post Office Box 1676
501 West University Avenue
Champaign, Illinois 61820
(217) 351-4040

Counsel for Respondent

Office - Supreme Court, U.S.
FILED
FEB 17 1984
ALEXANDER L. STEVAS,
CLERK

No. 83 - 87

In The

Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,

Petitioners,

vs.

JESSE A. VAIL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

THOMAS R. MILLER
Miller, Tracy, Braun,
& Wilson, Ltd.
316 S. Charter
Monticello, IL 61856
(217) 762-9416

Counsel for Petitioners

KRAMER PRINTING COMPANY • MONTICELLO, IL 61856

INDEX

Subject Index

Pages

Preface 1

Argument 2

I. RESPONDENT'S CITATION OF STATUTORY AUTHORITY AND CASE LAW ON THE STATUTORY CONSTRUCTION ISSUE IS MISPLACED 2

A Statutory Authority 2

B Case Law 4

II. CONTRARY TO RESPONDENT'S SUGGESTION, THIS COURT HAS YET TO RECOGNIZE THE CREATION OF A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT BY FEDERAL COMMON LAW 5

III. RESPONDENT'S ANALYSIS OF THE "DEPRIVATION" ISSUE FALLS SHORT 7

A There has been no deprivation of any right secured by the Constitution 7

B There has been no denial of due process in any event 8

Conclusion 10

TABLE OF AUTHORITIES CITED

CASES CITED

	Pages
Baker v. McCollan, 443 U.S. 145, 61 L.Ed.2d 433, 99 S.Ct. 2689	8
Bessler v. Board of Education, 43 Ill.App.3d 322, 356 N.E.2d 1253 (3rd Dist., 1976), modified 69 Ill.2d 191, 370 N.E.2d 1050 (1976)	7
Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976)	2,5,6
Board of Regents v. Roth, 408 U.S. 546, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)	5,6
Bonner v. Coughlin, 517 F.2d 1311, 1320, n.27 (7th Cir., 1975), modified *en banc* 545 F.2d 565 (1976), cert. den. 435 U.S. 932 (1978)	8
Casey v. DePetrillo, 697 F.2d 22 (1st Cir., 1983) *(per curiam)*	6
Ellis v. Hamilton, 669 F.2d 510 (7th Cir., 1982)	8,9
Goss v. Lopez, 419 U.S. 565, 42 L.Ed.2d 725, 95 S.Ct. 729 (1975)	5
Green v. Board of School Commissioners, 716 F.2d 1191 (7th Cir., 1983) *(per curiam)*	6
Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1971)	8,9

Pages

Libertyville Education Association v. Board of Education of School District No. 70, Lake County, 56 Ill.App.3d 503, 371 N.E.2d 676 (2nd Dist., 1977) 4,5

Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) 9

Lossman v. Pekorske, 707 F.2d 288 (7th Cir., 1983) . . 8

Lyznicki v. Board of Education, 707 F.2d 949 (7th Cir., 1983) 6

Manning v. Lockhart, 623 F.2d 536 (8th Cir., 1980) *(per curiam)* 6

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976) 8,9

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 56 L.Ed.2d 30, 198 S.Ct 1554 (1978) 5

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) 8,10

Paul v. Davis, 424 U.S. 693, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976) 5

Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) 5,6

Richards v. Board of Education, 21 Ill.2d 104 (1960) 3

No. 83 - 87

In The

Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,

Petitioners,

vs.

JESSE A. VAIL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

PREFACE

One of the central issues in this case is whether respondent has a property right which is protectible under the Constitution and the Civil Rights Act. Since the "right" asserted by respondent is one of public employment, the importance of state law is paramount, it being well established that property interests in employment are created either by state statute

or state contract law. *Bishop v. Wood*, 426 U.S. 341, 344, 96 S. Ct. 2074, 48 L.Ed.2d 684 (1976). Consequently, proper judicial construction of the Illinois tenure statutes is imperative in the case at bar. To this end, petitioners feel that clarification is in order as a result of respondent's arguments in part I.A. of his Reply Brief.

Additionally, respondent argues at length in part I.B. of his Reply Brief that federal common law creates for him a protectible property interest. Although petitioners strongly believe that such a suggestion has long before been rejected by this Court, they find it appropriate to reply to respondent's argument.

Finally, since respondent has chosen to address the other central issue--the "deprivation" issue--only in terms of "practicality", further comment is in order on this point as well.

ARGUMENT

I. RESPONDENT'S CITATION OF STATUTORY AUTHORITY AND CASE LAW ON THE STATUTORY CONSTRUCTION ISSUE IS MISPLACED.

A. Statutory Authority

In part I.A. of his Reply Brief (Reply Brief, pp. 8-11), respondent relies on §10-20.7 and §10-21.1 of the Illinois School Code[1] as authority for the proposition that the Illinois legislature has not limited an Illinois school board from entering into a two-year probationary term contract with a beginning teacher. More specifically, respondent argues that the phrase "subject to the limitations set forth in this Act", found in both

[1] See Respondent's Reply Brief, p.2, for text of §10-20.7 and §10-21.1 of the Illinois School Code

§10-20.7 and §10-21.1, refers to limitations on the length of a teacher's contract, those limitations to be found elsewhere in the School Code. From this, respondent concludes that since there are no express limitations on the length of probationary contracts found elsewhere in the School Code, there is no prohibition against a two-year probationary contract.

Respondent's reliance on the aforementioned statutory language is erroneous. It is erroneous for the reason that the phrase "subject to the limitations set forth in this Act", found in §10-20.7 and §10-21.1 refers to statutory limitations on teachers' salaries and nothing more.[3] The Illinois Supreme Court construed the subject phrase as such in *Richards v. Board of Education*, 21 Ill.2d 104 (1960), when it said at 109:

> From the language the legislature has implemented, it is clear that a school board has discretionary control over the salaries of its teachers, *subject only to any limits expressly fixed by the School Code* and to constitutional prohibitions

---

[3] Respondent attempts to buttress his argument by citing §34-39 of the Illinois School Code, which authorizes the Chicago Board of Education to enter into multi-year contracts with its employees. Respondent's reliance on §34-39 is misplaced for two reasons. First, the three-year provision is a specific grant of authority rather than a limitation (much the same as §10-23.8 and §10-23.8a authorize multi-year contracts for superintendents and principals). Second, §34-39 has application only to cities having a population exceeding 500,000, which means the City of Chicago.

[4] The School Code contains a number of limitations upon the power of school boards to fix the salaries of teachers (e.g. §10-20.7--prohibiting discrimination on account of sex or loss of pay because of jury duty; §10-20.15--prohibiting payment of salaries to uncertified teachers, or teachers who have failed to account for school property; §24-1--providing for teachers' wages to be paid monthly; and §24-8--establishing minimum salaries and giving credit for prior teaching experience).

> against actions that are arbitrary, discriminatory and unreasonable, or based upon an improper classification. (Emphasis added)

B. Case Law

Respondent also cites *Libertyville Education Association v. Board of Education of School District No. 70, Lake County*, 56 Ill. App.3d 503, 371 N.E. 2d 676 (2d Dist., 1977) as further authority that the Illinois tenure provisions do not prevent two-year probationary term contracts for probationary teachers. Again, respondent's reliance is misplaced.

The *Libertyville* case concerned the validity of a five-year collective bargaining agreement between a local board of education and a teachers' union. The Appellate Court found that such an agreement was not in contravention to the board's duty to fix teachers' salaries and was, therefore, not void or invalid. It is crucial to note that in *Libertyville* the contract in question was a collective bargaining agreement between the board and its teachers, not an individual contract between one teacher and the board. The multi-year contract in *Libertyville* had no effect upon the duty of the board to hire and fire teachers; it merely established pay schedules and bargainable policies for the term of the agreement. The court itself recognized the distinction between a case involving a contract purporting to bind a school board to employ a particular teacher in excess of one year and the case before it involving a collective bargaining agreement, to-wit:

> By contrast, in the instant case, the collective bargaining agreement did not purport to limit the Board's authority to hire or discharge teachers, and the old problem of whether or not a board can contractually bind itself to employ a particular teacher for a term longer than the current school year has, in any event, been pre-empted by the

teacher tenure laws (382 Ill. 383), 56 Ill.App.3d at 506.

It is plain that neither the language of §10-20.7 and §10-21.1 nor the holding in *Libertyville* support the position that Illinois probationary teachers may avail themselves to any more than two successive one-year term contracts within the backdrop of the Illinois tenure scheme.

II. CONTRARY TO RESPONDENT'S SUGGESTION, THIS COURT HAS YET TO RECOGNIZE THE CREATION OF A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT BY FEDERAL COMMON LAW.

In part I.B. of his Reply Brief (Reply Brief, pp. 11-20), the respondent seems to argue that even if he had no enforceable contract right under Illinois law, he has an enforceable property right under the United States Constitution. In essence, respondent asserts that a federal common law right can be created--as if by estoppel--which will rise to the level of "property" within the meaning of the Constitution. Such an assertion flies directly in the face of this Court's pronouncement that "[P]roperty interests, of course, are not created by the Constitution". *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).[1]

Specifically in cases of public employment, this court has said that a property interest in continued employment can be created in either of two ways--by statute or contract (ex-

[1] See also *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9, 56 L.Ed.2d 30, 198 S.Ct. 1554 (1978); *Bishop v. Wood*, 426 U.S. 341, 344, 48 L.Ed.2d 684, 96 S.Ct. 2074 (1976); *Paul v. Davis*, 424 U.S. 693, 709-710, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976); *Goss v. Lopez*, 419 U.S. 565, 572-574, 42 L.Ed.2d 725, 95 S.Ct. 729 (1975); *Perry v. Sindermann*, 408 U.S. 593, 602 n.7, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972).

press or implied)." "In either case, ..., the sufficiency of the claim of entitlement must be decided by reference to state law". *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) (footnote omitted). In other words, in order to determine whether the state has worked a deprivation of property within the context of public employment, the first inquiry must be whether or not there exists an enforceable right to continued employment under state law. If no such right exists, no property right is implicated. Furthermore, if the right is created by contract, the nature of that right for Constitutional purposes cannot be decided on that fact alone, but rather must be evaluated with reference to state law, for there is no rule of constitutional law that every public employment contract is property within the meaning of the Constitution. See *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Lyznicki v. Board of Education*, 707 F.2d 949 (7th Cir., 1983); *Green v. Board of School Commissioners*, 716 F.2d 1191 (7th Cir., 1983) *(per curiam)*; *Casey v. DePetrillo*, 697 F.2d 22 (1st Cir., 1983) *(per curiam)*; *Manning v. Lockhart*, 623 F.2d 536 (8th Cir., 1980) *(per curiam)*.

In sum, contrary to respondent's analysis of the property interest issue advanced in part I.B. of his Reply Brief, the combination of state statutory and contract law will determine whether the respondent had a property interest as meant in the due process clause. As previously argued in their Brief, petitioners assert that Illinois law, when properly analyzed and applied, blocks respondent's claim that he has a protectible property right to continued employment

---

[1] See *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976).

on either of two fronts: 1) the Illinois tenure statute prohibits a two-year probationary term contract; and 2) a term probationary contract within the Illinois tenure scheme does not warrant the protection of federal law, and, consequently, is not a Fourteenth Amendment property interest.

III. RESPONDENT'S ANALYSIS OF THE "DEPRIVATION" ISSUE FALLS SHORT.

Since respondent has chosen to analyze the "deprivation" issue in part III of his Reply Brief only in terms of "practicality" and without any argument that there was, in fact, a "deprivation" within the meaning of the Constitution, further comment is in order.

A. There has been no deprivation of any right secured by the Constitution.

Notwithstanding petitioners' assertion that a term probationary teaching contract in the state of Illinois is not property within the meaning of the Fourteenth Amendment, there has been, in any event, no deprivation of a right secured by the Fourteenth Amendment in the case at bar. It cannot be seriously contended that respondent has any remedy other than money damages.* Respondent's actual

* Respondent (Reply Brief, p. 29) suggests, without authority, that reinstatement is a remedy which might be available under federal law. It is assumed that such a suggestion stems from the notion that respondent had a "right" to teach and coach. Viewed in terms of contract law, respondent's "right" to teach and coach was merely a consideration he gave for receiving salary and other benefits. As such, any rights concerning respondent's teaching and coaching belong to the Board of Education which presumably was free to waive such rights. Thus, it is difficult to ascertain how respondent's "right" to teach and coach could amount to anything more than a unilateral expectation that he would be allowed to continue to do so. See also *Bessler v. Board of Education*, 43 Ill. App. 3d 322, 356 N.E.2d 1253 (3rd Dist., 1976), modified 69 Ill. 2d 191, 370 N.E.2d 1050 (1976).

right resulting from the breach of his term contract is to seek redress in the form of money damages from his employer. He can seek this remedy in state court, and until he has done so and been turned down, it cannot be said that he has suffered a deprivation. See *Bonner v. Coughlin*, 517 F.2d 1311, 1320, n. 27 (7th Cir., 1975), modified *en banc* 545 F.2d 565 (1976), cert. den. 435 U.S. 932 (1978).

B. There has been no denial of due process in any event.

If deprivation there was, it is a loss measured in monetary terms, and in view of the state court remedy available to respondent, the question to be answered is whether the deprivation really was "without due process of law." *Baker v. McCollan*, 443 U.S. at 145, 61 L.Ed.2d 433, 99 S.Ct. 2689. To answer this question, petitioners assert that this court

> must decide whether the [common law contract] remedies which the state of [Illinois] provides as a means of redress for property deprivations satisfy the requirements of procedural process. *Parratt v. Taylor*, 451 U.S. 527, 537, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

Petitioners recognize that there are a number of factors to be considered when deciding whether common law remedies constitute due process. These factors are:

> First, the private interest that will be affected[1]

[1] *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976) held a post-deprivation administrative hearing constitutionally adequate for cutting off disability payments, while *Ingraham v. Wright*, 430 U.S. 651 (1971) held that a state tort suit was sufficient due process to a student subject to corporal punishment. See also *Ellis v. Hamilton*, 669 F.2d 510 (7th Cir., 1982) and *Lossman v. Pokorske*, 707 F.2d 288 (7th Cir., 1983), wherein the court held post-deprivation judicial remedies constitutionally adequate involving deprivation of custody of children.

> second, the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [state] interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Ingraham v. Wright*, 430 U.S. 651, 675, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1971).

Petitioners assert that an analysis of the first of these factors -- the private interest affected--focuses on the importance of the interest and the finality of the deprivation. *Logan v. Zimmermann Brush Coompany*, 455 U.S. 422, 434, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).*

Finality of deprivation can be measured in two ways: 1) finality attaches when there is no opportunity to obtain judicial review; 455 U.S. at 434; and 2) finality attaches if the state common law remedy will not make the complainant whole; 455 U.S. at 436 and 437. If finality attaches in either of these two contexts, a pretermination hearing is mandated. *Logan v. Zimmermann Brush Company*, 455 U.S. 422, 434, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). If it does not, a post-termination hearing may be all the process that is due. Neither of these tests are met in the case at bar.* Con-

---

* Although a temporary loss of employment may not be insubstantial, it is no more grievous than cutting off one's disability benefits or taking one's children. See *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976) and *Ellis v. Hamilton*, 669 F.2d 510 (7th Cir., 1982), wherein post-deprivation judicial remedies were held to be constitutionally adequate.

* In comparing this Court's decision in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148 (1982) with the case at bar, *Logan* can be distinguished not only because the Plaintiff had no opportunity to obtain judicial review, 455 U.S. at 434, but also because the state court remedy would not have made the Plaintiff whole, 455 U.S. at 436-37, unlike the present case.

sequently, respondent's state court remedy is all the process that is due. *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). The additional procedural safeguard that the respondent seeks, a deprivation administrative hearing, would be of little utility when compared with the full evidentiary kind of hearing respondent can avail himself to in state court by suing for breach of contract.

—o—

CONCLUSION

For all of the reasons argued herein and in petitioners' Brief, the Judgment of the Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

THOMAS R. MILLER
MILLER, TRACY,
BRAUN & WILSON, LTD.
316 S. Charter
Monticello, Illinois

Counsel for Petitioners

Office - Supreme Court, U.S
FILED
DEC 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-87

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95 *et al.*,
Petitioners,
v.
JESSE A. VAIL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

RALPH S. BROWN
127 Wall Street
New Haven, CT 06520
(203) 432-4446

LAWRENCE WHITE
(Counsel of Record)
ANN H. FRANKE
One Dupont Circle
Suite 500
Washington, D.C. 20036
(202) 466-8050
Counsel for the American Association of University Professors

Of Counsel:
VICTOR J. STONE
University of Illinois
College of Law
Champaign, IL 61820

December 17, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. The Court Below Properly Found that Vail Had a Constitutionally Protected Property Interest in Serving Until the Conclusion of his Probationary Appointment	6
II. The Due Process Clause Protects a Teacher from Dismissal Without a Hearing During the Term of a Probationary Appointment	10
III. A Postdeprivation Remedy in the Form of a Common Law Action for Breach of Contract is Not Sufficient to Vindicate the Federal Interest in Ensuring that Due Process is Observed	15
CONCLUSION	22

TABLE OF AUTHORITIES

Cases: Page

Albaum v. Carey, 283 F. Supp. 3 (E.D.N.Y. 1968).. 15
Bates v. Hinds, 334 F. Supp. 528 (N.D. Tex. 1971) 12
Beitzell v. Jeffrey, 643 F.2d 870 (1st Cir. 1981).... 12
Bishop v. Wood, 426 U.S. 341 (1976) 8
Board of Regents v. Roth, 408 U.S. 564 (1972)....*passim*
Browzin v. Catholic University of America, 527 F.2d 843 (D.C. Cir. 1975) 13, 14
Bruce v. Board of Regents for Northwest Missouri State University, 414 F. Supp. 559 (W.D. Mo. 1976) 12
Carey v. Piphus, 435 U.S. 247 (1978) 16
Colm v. Vance, 567 F.2d 1125 (D.C. Cir. 1977).... 12
Connell v. Higginbotham, 403 U.S. 207 (1971)..5, 11, 15
Goldberg v. Kelly, 397 U.S. 254 (1970) 6
Goss v. Lopez, 419 U.S. 565 (1975) 21
Gray v. Board of Higher Education, City of New York, 692 F.2d 901 (2d Cir. 1982) 2
Hostrop v. Board of Junior College Dist. No. 515, 471 F.2d 488 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973), *on remand*, 399 F. Supp. 609 (N.D. Ill. 1974), *aff'd in part and rev'd in part*, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976) 11-12, 17
Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969).. 15
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 5-6, 19-20, 21
Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978) 7, 16, 21
Monroe v. Pape, 365 U.S. 167 (1961) 16, 18
Parratt v. Taylor, 451 U.S. 527 (1981) .....*passim*
Perry v. Sindermann, 408 U.S. 593 (1972).....*passim*
Reed v. Village of Shorewood, 704 F.2d 943 (7th Cir. 1983) 9, 10
Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976) 2
Russo v. Central Dist. No. 1, 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) 15

TABLE OF AUTHORITIES—Continued

Page

Ryan v. Aurora City Board of Education, 540 F.2d 222 (6th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) 12
Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927) 15
Vail v. Board of Education of Paris Union School Dist. No. 95, 706 F.2d 1435 (7th Cir. 1983) ..... *passim*
Wieman v. Updegraff, 344 U.S. 183 (1952) 5, 11, 15, 22

Constitutional Provisions and Statutes:

United States Constitution
First Amendment 23
Fourteenth Amendment ..... *passim*
Civil Rights Act of 1871
42 U.S.C. § 1983 ..... *passim*
Illinois School Code, Ill. Rev. Stat. ch. 122 (1981) .. 8, 10, 15

Other Authorities:

AAUP POLICY DOCUMENTS AND REPORTS (3d ed. 1977)
1940 *Statement of Principles on Academic Freedom and Tenure* 2, 5, 13
1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings* 2
Academic Freedom and Tenure: Adelphi University, 53 AAUP BULL. 278 (1967) 14
Academic Freedom and Tenure: St. John's University (New York), 52 AAUP BULL. 12
Academic Freedom and Tenure: Wisconsin State (1966) 14
University—Whitewater, 54 AAUP BULL. 25 (1968) 14
COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE: REPORT AND RECOMMENDATIONS (1973) 12-13
Developments in the Law—Academic Freedom, 81 HARV. L. REV. 1045 (1968) 3, 15

TABLE OF AUTHORITIES—Continued

Page

Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 IOWA L. REV. 1119 (1980) 13

Note, *Due Process and Section 1983: Limiting Parratt v. Taylor to Negligent Conduct*, 71 CAL. L. REV. 253 (1983) 18

Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-87

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95 *et al.*,
Petitioners,

v.

JESSE A. VAIL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

This brief is filed, with the consent of all parties, on behalf of the American Association of University Professors ("AAUP") as *amicus curiae* in support of the respondent.

INTEREST OF THE *AMICUS*

The AAUP is a membership organization of 65,000 faculty members and research scholars at American institutions of higher education. Founded in 1915, it is the nation's oldest and largest enterprise dedicated exclusively to the interests of professional scholars in all academic disciplines.

One of the AAUP's principal tasks, frequently undertaken in collaboration with other higher education organizations, is the formulation of national standards for

the protection of academic freedom and tenure at American colleges and universities. Paramount among these is the 1940 *Statement of Principles on Academic Freedom and Tenure*, prepared jointly by the AAUP and the Association of American Colleges and subsequently endorsed by over one hundred educational organizations and learned societies. Courts throughout the country, including this Court, frequently refer to AAUP policy statements in resolving disputes over the terms and conditions of faculty employment.[1]

From its founding, the AAUP's commitment to the protection of academic freedom has encompassed not only the substantive rights and liberties of faculty members, but also the procedures used in the termination or nonrenewal of academic appointments. Through statements of general applicability and investigations of particular personnel matters, the AAUP has declared its concern for fair and adequate procedures and its conviction that academic freedom cannot flourish unless such procedures are observed by college and university officials and governing boards.

Broad procedural, as well as substantive, guidelines protective of tenure as a principal safeguard of academic freedom are contained in the 1940 *Statement of Principles*. Derivative procedural requisites are set forth in the 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings*, which, like the 1940 *Statement*, was jointly formulated by the AAUP and the Association of American Colleges.[2]

---

[1] *E.g., Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 756 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972). *See Gray v. Board of Higher Education, City of New York*, 692 F.2d 901, 907 (2d Cir. 1982) ("AAUP policy statements have assisted the courts in the past in resolving a wide range of educational controversies").

[2] The 1940 *Statement of Principles* and the 1958 *Statement on Procedural Standards* are reprinted in AAUP POLICY DOCUMENTS AND REPORTS (3d ed. 1977), at 1-4 and 5-7, respectively.

The AAUP participated as *amicus curiae* in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), the two seminal cases in this Court defining the procedural rights of faculty members at state-supported institutions of higher education. Through its published case reports examining conditions of academic freedom and tenure at American colleges and universities,[3] the AAUP has developed a coherent "common law"[4] of institutional procedure that defines, perhaps more clearly than any other source, the contours of academic due process.

The issues implicated in this case are of direct concern not only to beginning or other teachers holding probationary appointments but to the purposes and objectives of higher education itself. When faculty tenure or other protected status is not present or applicable, it is especially important to assure that academic freedom and related constitutional rights, properly defined and prescribed, are in fact respected through the affordance of due process. The AAUP is concerned about the implications this case may have for education in general and higher education in particular. What was done to Jesse Vail could be done to any member of our profession if due process rights are not respected.

SUMMARY OF ARGUMENT

In *Roth* and *Sindermann*, the Court fashioned a straightforward approach for determining when states are required by the Due Process Clause to provide notice and a hearing in connection with the decision to dismiss an employee. The two cases called for resort to state legislation, contract law, or the employing institution's own personnel practices to discover whether a discharged

---

[3] For a description of the AAUP's investigative and mediative roles in American higher education, *see Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1105-12 (1968).

[4] *Cf. Perry v. Sindermann*, 408 U.S. 593, 602 (1972).

state employee had a legitimate claim of entitlement to continued employment. In Point I of our Argument, we argue that the court below applied the rule from *Roth* and *Sindermann* properly. The court found that representations made to Vail at the time he was hired gave rise to an enforceable, mutually engendered expectation of employment for a two-year term. The court concluded that Vail had a constitutionally protected property interest in his employment with the Board of Education, and that the Board of Education violated the Due Process Clause by depriving him of that interest without explaining the reasons for its action or giving Vail the opportunity to contest those reasons at a hearing. The result in this case is consistent with controlling decisions of this Court, and promotes the important objectives of procedural due process as developed in cases before and after *Roth* and *Sindermann*.

In Point II, we examine a pivotal issue that separated the dissenting judge from the other members of the panel in the court below. In our view, the constitutional analysis in *Roth* and *Sindermann* did not turn on the uniqueness of tenure as a "special" form of job entitlement.[3] For purposes of determining whether a property interest is implicated at all, the decisions in *Roth* and *Sindermann* do not exalt tenure over other sources of entitlement. Jesse Vail's property interest in his job was as strong as the interest Robert Sindermann claimed in his, notwithstanding the fact that Vail was a probationary employee while Sindermann claimed the equivalent of a tenured position.

---

[3] *Vail v. Board of Education of Paris Union School Dist. No. 95*, 706 F.2d 1435, 1451 (7th Cir. 1983) (Posner, J., dissenting), reprinted in the appendix to the Petition for a Writ of Certiorari [hereinafter "Pet. App."] at App. 31. For the sake of convenience, the opinions of the panel members in the court below will be cited in this brief by parallel references to the official reporter ("706 F.2d at ——") and the appendix to the petition for certiorari ("Pet. App. ——").

While a probationary faculty member may not have a mutually engendered expectation of continued employment beyond the term of his or her appointment, the probationer's legitimate entitlement to serve until the end of the appointment is as strong as the entitlement of tenure for that term. Just as a tenured faculty member cannot be terminated except "for cause" during the indefinite term of a tenured appointment, a probationary faculty member is subject to the same standard—separation only "for cause"—during the term of a probationary appointment. This is specified in the 1940 *Statement of Principles* and constitutes accepted practice in the educational community. The Court's decisions in *Wieman v. Updegraff*, 344 U.S. 183 (1952), and *Connell v. Higginbotham*, 403 U.S. 207 (1971) (per curiam), reflect the fact that probationary faculty members are entitled to the protections of the Due Process Clause during the term of their appointments.

Finally, we turn in Point III to another issue that divided the panel in the court below. In misplaced reliance on *Parratt v. Taylor*, 451 U.S. 527 (1981), Judge Posner argued that the state had in essence provided Vail with an adequate postdeprivation remedy in the form of a cause of action for breach of contract, assertable in a state trial court. We believe that Judge Posner's analysis fails because of an unsupportable predicate—namely, that "the right Vail was allegedly deprived of is just a right to a particular remedy—damages . . . ."[6] To the contrary, Vail was deprived of something more fundamental: the assurance of a fair and impartial hearing. The damages sought and awarded in this case vindicated Vail's *constitutional* right to fair evaluation and treatment, not simply his contractual right to damages for breach. *Parratt* does not hold to the contrary. Nor does *Parratt* permit a postdeprivation remedy under the facts presented in Vail's case. We contend, on the strength of *Logan v.*

[6] 706 F.2d at 1453, Pet. App. 35 (Posner, J., dissenting).

Zimmerman Brush Co., 455 U.S. 422 (1982), and *Parratt* itself, that Vail was entitled to a hearing *before* he was dismissed, and that the Board of Education's failure to provide him with a pretermination hearing violated the Due Process Clause.

ARGUMENT

I. The Court Below Properly Found that Vail Had a Constitutionally Protected Property Interest in Serving Until the Conclusion of his Probationary Appointment.

In *Roth* and *Sindermann*, the Court took a new approach to the analysis of procedural claims under the Due Process Clause.[7] Where government benefits were at issue, the two cases shifted the analytic focus from an independent appraisal of the importance of the claimed benefit, *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970), to the *source* and *nature* of the claim. The Court distinguished in *Roth* between a benefit to which the claimant could assert "a legitimate claim of entitlement" and a benefit for which the claimant had no more than "an abstract need or desire"; only in the former instance did the claim rise to the level of a constitutionally cognizable "property" interest. 408 U.S. at 577.

In *Roth* and *Sindermann*, the Court looked in the first instance to state law to determine whether a legitimate claim of entitlement existed to the continued enjoyment of a government benefit. Property interests, the Court ruled in *Roth*, "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.* The question in *Sindermann* was whether the claimant's lack of a contractual or tenure right to reemployment defeated his due process claim. The Court observed:

---

[7] For the convenience of the Court, we attach as an addendum to this brief a selected list of recent scholarly writing bearing on the *Roth* and *Sindermann* decisions.

> We hold that it does not. . . . [The] absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in re-employment.

408 U.S. at 596, 601.

In *Roth*, the Court found that a teacher who was not reappointed at the end of a one-year employment contract had no entitlement to continue as a member of the faculty. The teacher in *Sindermann*, however, was given an opportunity to prove his claim that he was entitled to continued employment in the absence of demonstrated cause for dismissal. "Such proof," the Court held, "would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. at 603.

Roth and *Sindermann* look to interests grounded in state law as the primary source of the property-entitlement claim. But federal courts, especially in actions brought under 42 U.S.C. § 1983, determine whether the interests are the kind of property (or, in an appropriate case, the kind of liberty) protected by the Due Process Clause, and, if so, the extent of the process "due" under the circumstances. *See Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9 (1978).

The *Roth-Sindermann* doctrine requires courts to look first to the law and practices of the employing state in order to determine whether the complainant has an enforceable property interest in the benefit claimed. In most instances, as the Court has suggested in a related context, "[t]he outcome of that inquiry is clear. . . ." *Memphis Light, Gas & Water Division v. Craft, supra*, 436 U.S. at 9. When the state law issue has not been definitively decided, this Court ordinarily defers to the construction of state law adopted by the lower federal courts in the forum state, particularly when the lower

trial and appellate courts have reached a consistent conclusion. *Bishop v. Wood*, 426 U.S. 341, 345-46 (1976); *see also* cases cited in *id.* at 346 n.10.

In this case, the court below applied *Roth* and *Sindermann* and properly concluded that Vail had a constitutionally protected property interest in his job. The court examined the provisions of the Illinois School Code, Ill. Rev. Stat. ch. 122 (1981), and concluded that the Board of Education's oral promise to renew Vail's appointment for a second year constituted an enforceable contractual obligation under Illinois law that was not prohibited by the School Code. The court also found that, even if no enforceable contract existed, the Board of Education's representations to Vail created a mutual expectation of continued employment sufficient under *Roth* and *Sindermann* to create a property right protected by the Due Process Clause.

The petitioners acknowledge that the Illinois Supreme Court has not conclusively resolved the question whether under state law a probationary faculty member can receive a two-year appointment.[8] Under the circumstances, the construction of state law adopted by the District Court and Seventh Circuit—that Illinois law does not expressly prohibit two-year appointments—is entitled to deference in this Court.

Even if the construction of state law adopted by the lower courts were faulty and the Illinois School Code prohibited two-year probationary appointments, that fact would not necessarily alter the constitutional conclusion that Vail had a protected property interest in a second year of employment. The "absence of . . . an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in re-employment," said the Court in *Sindermann*; a property interest can also be created by "mutually explicit understandings"

[8] "[T]he Illinois Supreme Court has yet to rule on the legality of a two-year probationary contract. . . ." **Brief for Petitioners 18.**

that support a claim of entitlement to a government benefit. 408 U.S. at 601. The Board of Education promised Vail that his appointment would be renewed automatically for a second year. That was an important inducement for Vail, because it would have assured him an opportunity to be considered for tenure. As the court below correctly observed, Vail was entitled to rely on the Board's promise even if the promise was one the Board could not or should not have made.

The commandment in *Roth* and *Sindermann* to look to state law does not mean that state law controls *absolutely* the determination of constitutional property interests. Judge Posner himself made this point in *Reed v. Village of Shorewood*, 704 F.2d 942 (7th Cir. 1983), a case decided less than a month before *Vail*. In *Reed*, the owners of a bar complained that city officials deprived them of their liquor license without a hearing by waging a campaign of harassment and intimidation that succeeded in forcing the plaintiffs to go out of business. The officials argued that the plaintiffs had no property interest in their license because the Illinois Liquor Control Act specifically recited that a liquor license was "a personal privilege" that did "not constitute property." 704 F.2d at 948.

"[T]he conclusion may seem inescapable," Judge Posner wrote, "that these plaintiffs had no Fourteenth Amendment property right in their liquor license. But it is not. . . . 'Property' in the Illinois Liquor Control Act need not mean the same thing as 'property' in the due process clause." *Id.* He went on to conclude that the plaintiffs had a protected property interest in their liquor license notwithstanding the language of state law, and were entitled to offer evidence at trial that city officials violated the Due Process Clause by, in effect, depriving the plaintiffs of their license without providing "all the protections, procedural and substantive, of the revocation process." *Id.* at 949.

Reed stands for the proposition that state law is not the *sole* source of property rights protected by the Due Process Clause. Whether "property" has vested in a particular case is, ultimately, a federal question, principally *but not conclusively* to be resolved by reference to state law. If, in Vail's case, the Illinois School Code did not permit two-year appointments for probationary faculty members, Vail would still be within his rights to rely on official representations by the Board of Education as an independent source of entitlement to a two-year probationary appointment.

In sum, the court below was correct to make *Roth* and *Sindermann* its analytic point of departure. As required by those cases, the court looked to see whether actions by the Board of Education had fostered a mutually explicit understanding that Vail would be entitled to serve for a second probationary year. The court concluded that Vail had a legitimate claim of entitlement to employment for a second year. The ruling was correct and should be affirmed by this Court.

II. The Due Process Clause Protects a Teacher from Dismissal Without a Hearing During the Term of a Probationary Appointment.

In his dissenting opinion in the court below, Judge Posner sought to limit the holding in *Sindermann* by distinguishing between the *tenure* right asserted by the plaintiff in that case and the *contract* right claimed by Jesse Vail here. Judge Posner argued that tenure was a "special" right because of its "indefinite duration," in contrast to a probationer's "mere contract right" to a specific term of employment. 706 F.2d at 1451, Pet. App. 31, 32.

Judge Posner's distinction is not warranted by the decisions of this Court and other federal courts or by sound educational practice. A probationary faculty member enjoys precisely the same expectation of continued employ-

ment *during the term of his or her appointment* as a tenured faculty member during the longer term of employment normally associated with tenured status.

A.

Judge Eschbach aptly indicates that Judge Posner's interpretation of *Sindermann* "finds no support in the Supreme Court's opinion" in that case. 706 F.2d at 1444, Pet. App. 17 (Eschbach, J., concurring). In fact, Judge Posner's views cannot be squared with *Roth*'s reliance on earlier cases specifically recognizing the due process rights of probationary faculty members. The Court cited *Wieman v. Updegraff*, 344 U.S. 183 (1952), for the proposition that "college professors and staff members dismissed *during the terms of their contracts* have interests in continued employment that are safeguarded by due process." *Roth*, 408 U.S. at 576-77 (emphasis added; citation omitted). From *Connell v. Higginbotham*, 403 U.S. 207 (1971) (per curiam), the Court derived an even more pertinent rule: a teacher "recently hired *without tenure* or a formal contract, but nonetheless with a clearly implied promise of continued employment," could not be dismissed without the hearing "required by due process." *Id.* (quoting in part from *Connell, supra*, 403 U.S. at 208) (emphasis added).

The court below correctly adduced its own precedent in *Hostrop v. Board of Junior College District No. 515*, 471 F.2d 488 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973) [*Hostrop I*],[9] holding that the termination of a college president in the first year of a two-year contract deprived him of a constitutionally protected property interest in continued employment. Notwithstanding the fact that the president had no right of tenure in his position, the court, citing *Sindermann* and *Roth*, held that a

---

[9] *On remand*, 399 F. Supp. 609 (N.D. Ill. 1974), *aff'd in part and rev'd in part*, 523 F.2d 569 (7th Cir. 1975) [*Hostrop II*], *cert. denied*, 425 U.S. 963 (1976).

term of employment set by contract created a property interest in continued employment that the state could not extinguish without conforming to the dictates of procedural due process. 471 F.2d at 494.

To be sure, matters are different when a probationer's term contract *expires*. Lower courts, following *Roth*, recognize that a probationer ordinarily has no enforceable expectation of renewal from one contract term to the next during the probationary period. *E.g., Ryan v. Aurora City Board of Education*, 540 F.2d 222 (6th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Beitzell v. Jeffrey*, 643 F.2d 870 (1st Cir. 1981). The case law, however, clearly reflects the difference between appointments not renewed and appointments terminated prematurely; when terminations occur during the term of an appointment, courts enforce the constitutional right to some form of hearing. "Simply because one may not be entitled to indefinite employment does not mean he has no property interest in his job *during* the term he does enjoy." *Colm v. Vance*, 567 F.2d 1125, 1129 n.3 (D.C. Cir. 1977) (emphasis in original). *See also Bruce v. Board of Regents for Northwest Missouri State University*, 414 F. Supp. 559 (W.D. Mo. 1976); *Bates v. Hinds*, 334 F. Supp. 528 (N.D. Tex. 1971).

B.

A defined period of probationary service is an essential element in many systems of employment, and is virtually universal in American education at all levels. Because of the major obligation an institution assumes by making a tenured appointment, the tenure system presupposes a period of probationary service during which the probationer is expected to satisfy employer and peers that he or she is qualified for and deserving of the special protections associated with tenured status. In the words of the Commission on Academic Tenure in Higher Education, "[t]he tenure system depends in a fundamental way on the effectiveness of the probationary period—in helping the younger faculty member to develop his abilities

as teacher and scholar and in conducing to reliable judgment about his future growth and contribution to the institution." [10]

The 1940 *Statement of Principles on Academic Freedom and Tenure*, promulgated by the AAUP and the Association of American Colleges, is the paradigmatic expression of academic tenure in American higher education.[11] The 1940 *Statement of Principles* explicitly envisions a probationary period of not more than seven years for all teachers and scholars. During the probationary period, a probationer has the same academic freedom possessed by any other member of the faculty regardless of length of service. Since the satisfactory completion of a probationary period is a prerequisite to the conferral of tenure, the teacher whose probationary appointment is prematurely terminated suffers a deprivation that is different only in degree from the wrongful termination of a tenured appointment.

Dismissal during the term of probationary service denies the faculty member a fundamental prerogative of the practice of the academic profession: the "right of

---

[10] COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE: REPORT AND RECOMMENDATIONS 62 (1973).

[11] The 1940 *Statement of Principles* is reprinted in AAUP POLICY DOCUMENTS AND REPORTS 1-4 (3d ed. 1977). As one court had noted, the 1940 *Statement of Principles* embodies "widely shared norms within the academic community, having achieved acceptance by organizations which represent teachers as well as organizations which represent college administrators and governing boards." *Browzin v. Catholic University of America*, 527 F.2d 843, 848 n.8 (D.C. Cir. 1975). See also Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 IOWA L. REV. 1119, 1150-51 (1980) (observing that the 1940 *Statement of Principles* "has become so widely accepted throughout American higher education that it has achieved judicial recognition as a usage of the profession").

access to his students." [12] Because it happens so infrequently, dismissal during the term of a probationary appointment causes serious injury to the reputation of a young scholar. As an AAUP committee reported on one such occasion:

> To remove a professor from his classroom and other academic duties during the academic year for which he has been appointed seems certain to cast grave suspicions upon his character or competence in the minds of those who might employ him in the future, suspicions which might not arise if the teacher were refused appointment after adequate notice.[13]

The inhibiting effect of termination during a term appointment, moreover, transcends the individual faculty member involved. In the absence of a requirement of notice and an opportunity to be heard, all probationary faculty members would labor under the disquieting risk of summary dismissal, the personal consequences of which could not be fully remedied in a proceeding for breach of contract. Academic freedom for all faculty members would be severely jeopardized under such a regime.

The teaching profession, in sum, recognizes the grave consequences that inevitably attend the dismissal of a probationary faculty member like Jesse Vail [14] during the

---

[12] *Academic Freedom and Tenure: Adelphi University*, 53 AAUP BULL. 278, 285 (1967). *Cf. Academic Freedom and Tenure: St. John's University (New York)*, 52 AAUP BULL. 12, 16 (1966).

In this and the succeeding footnote, we cite to the reports of AAUP investigating committees which appear in the AAUP BULLETIN. These reports are "noted for their thoroughness and scrupulous care." *Browzin v. Catholic Univ. of America*, 527 F.2d 843, 848 n.8 (D.C. Cir. 1975).

[13] *Academic Freedom and Tenure: Wisconsin State University—Whitewater*, 54 AAUP BULL. 25, 27 (1968).

[14] In his dissent, Judge Posner draws a distinction between a "teacher" and an "athletic coach." 706 F.2d at 1451, Pet. App. 32. He observes that Jesse Vail was the latter—the unspoken assump-

course of a term appointment. In this context, educational policy converges with constitutional principles recognized in *Wieman v. Updegraff*, *Connell v. Higginbotham*, and *Roth* itself.

III. A Postdeprivation Remedy in the Form of a Common Law Action for Breach of Contract is Not Sufficient to Vindicate the Federal Interest in Ensuring that Due Process is Observed.

Jesse Vail brought this action against his employer under 42 U.S.C. § 1983. While an action under that statute may resemble a tort or contract claim arising under state law, it nevertheless serves a different and more crucial purpose.

---

tion being that Vail could not simultaneously be characterized as the former and could not claim the constitutional and statutory protections associated with teaching status.

Judge Posner's approach prompts us to make two brief comments. First, the Illinois School Code does not distinguish between teachers and coaches; for purposes of qualifying for tenure under Illinois law, Vail was a "teacher" within the meaning of that term in the Code.

Second, Judge Posner is clearly mistaken in assuming that academic freedom is a right that can be asserted only by faculty members in *higher* education. See *Russo v. Central Dist. No. 1*, 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Albaum v. Carey*, 283 F. Supp. 3 (E.D.N.Y. 1968); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1112-13 (1968).

It is contrary to the animating spirit of academic freedom to accord *more* procedural protection to one set of teachers than another because one is more intimately involved in the discovery and dissemination of knowledge. It may be generally true that the secondary school faculty member engaged in routine instruction is at one end of a continuum and the learned scientist or philosopher who labors every day on the frontier of advanced knowledge is at the other. But this progression does not vitiate the need for due process at all levels; if anything, it argues in favor of it. One of the most celebrated academic freedom cases of all time, a case cited by Judge Posner in his dissent—*Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927)—involved a public high school teacher. In our view, the protections of procedural due process must be applicable to all faculty members if academic freedom for all is to be protected.

We argue below that Judge Posner was fundamentally incorrect in asserting that "[t]here is no federal interest in this case. . . ." [15] Jesse Vail sued because procedural rights guaranteed by the Constitution—rights wholly separate from employment rights created by operation of state law—were trammeled when he was discharged from his job without a hearing. As to the suggestion in Judge Posner's dissent that Vail had an adequate remedy in the form of a contract claim in state court, that remedy could be pursued only *after* the Board of Education deprived Vail of his property interest in continued employment. It is clear from recent decisions of this Court that a postdeprivation remedy is not constitutionally adequate under the circumstances presented here.

A.

While there is substantial interplay between the common law of the forum state and Section 1983, the Court stated in *Monroe v. Pape*, 365 U.S. 167 (1961), that the causes of action under state and federal law are not identical and vindicate entirely different substantive rights. "The federal remedy," observed the Court, "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." 365 U.S. at 183. In his concurring opinion, Justice Harlan attributed to the Congress that enacted Section 1983

> the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right. [*Id.* at 196.] [16]

---

[15] 706 F.2d at 1449, Pet. App. 28.

[16] *Accord, Carey v. Piphus*, 435 U.S. 247, 258 (1978). *Cf. Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9 (1978) ("[a]lthough the underlying substantive interest is created by 'an

Jesse Vail suffered two separate wrongs. His employment contract was breached, giving rise to an action for damages; and he was not given an opportunity to contest the state's decision to fire him before that decision was put into effect, giving rise to an action under Section 1983. Although the wrongs may have been related, they created two distinct causes of action:

> A civil rights action based on the deprivation of due process and a contract action to recover damages for a breach are independent remedies. The civil rights action based on deprivation of a property interest established by contract seeks vindication for the arbitrary manner in which the contract was breached. A "garden variety" contract action seeks damages only for the losses caused by the breach once it has occurred in any manner whatsoever. There will be occasions when one action will lie but the other will not, as when the state has grounds to break an employment contract, but does so by violating an employee's due process rights to notice and a hearing.

Hostrop I, *supra*, 471 F.2d at 494 n.15.[17]

Not only are constitutional and contractual causes of action distinct, but different remedies may be appropriate in each context. Declaratory and injunctive relief, which may not be available to litigants in a state court

---

independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause") (quoting *Roth*, 408 U.S. at 577, and *Sindermann*, 408 U.S. at 602).

[17] This is precisely what came to pass in *Hostrop II*, a case not discussed by the court below (perhaps because Judge Posner concentrated his fire on *Hostrop I*). When the cause was remanded for trial after *Hostrop I*, the trial court found that the plaintiff's dismissal was fully justified by his conduct during his term as president; the Seventh Circuit nevertheless held that he was entitled to damages on the *separate* ground that he had been deprived of his constitutional right to notice and a hearing. *Hostrop II*, 523 F.2d at 579.

action for breach of contract, can be asserted by the complainant in an action under Section 1983. In Vail's case, as it happens, the trial court denied the plaintiff's application for reinstatement and awarded him damages for breach of contract *and deprivation of constitutional rights* that looked very much like the award Vail would have received in state court had he sued in contract alone. However, the mere fact that the trial court in its discretion fashioned a remedy resembling the one available in state court does not mean that state and federal causes of action are identical, as Judge Posner appears to suggest. Justice Harlan may have anticipated this very suggestion when he wrote in *Monroe* that when the state remedy is "fully appropriate to redress those injuries against which the Constitution provides protection," it is a matter of "the purest coincidence." 365 U.S. at 196 n.5 (Harlan, J., concurring).[18]

B.

Relying on his view of *Parratt v. Taylor*, 451 U.S. 527 (1981), Judge Posner argues that, assuming Vail had a constitutionally protected property interest in serving as football coach until the expiration of his term, the state nevertheless provided him with all the process he was "due" in the form of a post-termination action for breach of contract assertable in state court.[19]

According to *Parratt*, the many decisions of this Court dealing with the constitutionality of postdeprivation remedies reduce to a straightforward rule:

---

[18] *See* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 20 (1980).

[19] *Parratt* lends itself to a variety of interpretations because of the extent to which the Court's opinion is qualified by the concurring opinions. *See Note, Due Process and Section 1983: Limiting Parratt v. Taylor to Negligent Conduct*, 71 CALIF. L. REV. 253 (1983).

> These cases recognize that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process. [451 U.S. at 539.]

In *Parratt*, an inmate brought an action under Section 1983 against the prison officials who were allegedly responsible for losing a mail-order hobby kit before it could be delivered to the plaintiff. The Court observed that it was "not only impracticable, but impossible" to provide a meaningful hearing before the hobby kit disappeared, since the state could not "predict precisely when the loss [would] occur," *id.* at 541, or even that it would occur at all. *Parratt* rested on the fact that the actions of culpable state officials were "random and unauthorized." 451 U.S. at 541. This made it literally impossible for the state to provide a hearing in advance of an occurrence it could not anticipate.

Matters are different, however, when the property interest at stake is an entitlement to continued employment, an entitlement that cannot be extinguished except by a deliberate act. Justice Blackmun (joined by Justice White), concurring in *Parratt*, expressed the logical corollary to the holding in that case:

> While the "random and unauthorized" nature of negligent acts by state employees makes it difficult for the State to "provide a meaningful hearing before the deprivation takes place," [451 U.S.] at 541, it is rare that the same can be said of intentional acts by state employees. *When it is possible for a State to institute procedures to contain and direct the intentional actions of its officials*, it should be required, as a matter of due process, to do so. [451 U.S. at 546; emphasis added.]

One year later, Justice Blackmun applied the corollary to the different facts in *Logan v. Zimmerman Brush Co.*,

455 U.S. 422 (1982). There, a probationary employee who was fired during his first month of employment was deprived of a hearing before the Illinois Fair Employment Practices Commission because of the Commission's own failure to convene a fact-finding conference within the jurisdictional time limit imposed by state statute. The employer, pointing to the existence of common-law tort remedies provided under state law, argued that these postdeprivation remedies were adequate under *Parratt* to satisfy the requirements of due process. The Court disagreed:

> This argument misses *Parratt*'s point. In *Parratt*, the Court emphasized that it was dealing with "a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure." 451 U.S., at 541. Here, in contrast, it is the state system itself that destroys a complainant's property interest . . . . Logan is challenging not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards. [455 U.S. at 435-36.]

Parratt rested ultimately on the practical conclusion that the state could not have held a predeprivation hearing even if it wanted to, given the "random" nature of the deprivation suffered by the inmate in that case. In *Logan*, on the other hand, it was not a practical impossibility to hold a hearing on the plaintiff's claim before the plaintiff lost his job. For that reason, the Court held in *Logan* that a postdeprivation remedy in the form of a right of action in state court was constitutionally inadequate.

Here as well, no practical impediment prevented the Board of Education from affording Vail the opportunity for some kind of a hearing prior to his dismissal. There was nothing "random" or unpredictable about the Board's conduct, as there was in *Parratt*. Under the circum-

stances, the Board violated Vail's constitutional rights by providing him only with a postdeprivation remedy—and one of questionable value at that[20]—when it could have provided a hearing before Vail lost his job.

C.

Judge Posner is concerned that, by recognizing Vail's property interest in the terms of his employment agreement with the state, the court invites *anybody* who contracts with the state—even the proverbial "supplier of paper clips"—to assert the equivalent of a breach-of-contract claim in federal court. This result, he asserts, would be "contrary to every principle of federalism" and would risk the "trivialization" of the Due Process Clause. 706 F.2d at 1449, 1456, Pet. App. 28, 42.

Judge Posner confuses two analytically distinct steps in due process cases. The Court has distinguished in recent years between the threshold *Roth-Sindermann* inquiry (is there a "property" interest to begin with?) and the subsequent procedural inquiry (in extinguishing that right, did the state provide the "process" that was "due"?). Government conduct is actionable under the Due Process Clause only if it involves a deprivation of property *and* the absence of "due" process.[21] The issue in *Parratt* was not whether a property interest existed—it concededly did, 451 U.S. at 529 n.1—but whether the process provided by the state was constitutionally adequate.

This determination rests in part on "the importance of the private interest" at stake. *Logan*, *supra*, 455 U.S. at 434. An interest in "retaining . . . employment" is a substantial interest. *Id.* It is considerably more substantial than the interest of an inmate in his hobby kit or

---

[20] *Logan*, *supra*, 455 U.S. at 436-37 (describing a common law action in state court as a "lengthy and speculative process, which . . . . will never make the complainant entirely whole").

[21] *Memphis Light*, *supra*; *Goss v. Lopez*, 419 U.S. 565 (1975).

the pecuniary interest of a paper clip supplier in the specific performance of a sales contract. A predeprivation hearing may be constitutionally compelled in a case involving the right to continued employment. But the same right did not belong to the inmate in *Parratt*, and there is no reason why the same procedural right would necessarily belong to the paper clip supplier. The paper clip supplier may have a constitutionally protected interest in seeing that the state does not act arbitrarily or illegally in meeting its contractual obligations. But that does not mean that the paper clip supplier may insist on the same procedural rights under the Due Process Clause that Vail must receive in accordance with the judgment below.

In short, we are not as alarmed as Judge Posner appears to be that, by recognizing a property interest in Jesse Vail's case, the Seventh Circuit may be creating property interests for others who execute contracts of a different sort with the state. The existence of a property interest is not the whole story in due process cases; one who possesses a property interest is still not entitled to relief in an action under 42 U.S.C. § 1983 unless he can show that state-provided process is inadequate under the particular circumstances of his case. Others possessing property interests of a different kind will not inevitably be able to make that showing simply because Vail succeeded here.

CONCLUSION

Jesse Vail's plight raises concerns that transcend his own situation. The principles underlying the decision of the court below are important because of their direct relationship to academic freedom, a cherished constitutional right. The decision, therefore, is of direct consequence to all teachers—"in our entire educational system, from the primary grades to the university" [22]—who are dedicated to the pursuit of truth and its free exposition.

---

[22] *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

We do not know why Jesse Vail was dismissed after his first year of service. Vail may not know either. We do know, however, that as a faculty member at a state-supported school Vail could not be fired for reasons violative of his First Amendment rights. A pretermination hearing assures Vail and his colleagues that, if impermissible considerations violative of his academic freedom influenced the board's decision to fire him, he would have an opportunity to bring that fact to light. The right to a hearing, by itself, serves substantially to check any impulse a school board member may have to base teacher employment decisions on considerations not tolerated by the First Amendment.

If a probationary faculty member can be summarily dismissed during the term of an appointment, then the academic freedom of teachers everywhere is vulnerable. For these reasons, and on the strength of *Roth* and *Sindermann*, the AAUP urges the Court to affirm the judgment of the court below.

Respectfully submitted,

RALPH S. BROWN
127 Wall Street
New Haven, CT 06520
(203) 432-4446

LAWRENCE WHITE
(Counsel of Record)
ANN H. FRANKE
One Dupont Circle
Suite 500
Washington, D.C. 20036
(202) 466-8050
Counsel for the American Association of University Professors

Of Counsel:
VICTOR J. STONE
University of Illinois
College of Law
Champaign, IL 61820

December 17, 1983

ADDENDUM

A SELECTION OF RECENT SCHOLARLY WRITING BEARING ON PUBLIC EMPLOYMENT AND DUE PROCESS

The contributions listed here may be instructive to the Court, as they were to the writers of this brief. Their authors would not necessarily agree with the classifications to which we have assigned them, any more than, even within a given classification, they agree with one another.

A. Generally Accepting the Approach of *Roth* and *Sindermann*

Finkin, *Toward a Law of Academic Status*, 22 BUFF. L. REV. 575 (1973)

Gray, *Procedural Fairness and Substantive Rights*, in DUE PROCESS (Pennock and Chapman ed.), NOMOS XVIII 82 (1977)

Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 CALIF. L. REV. 146 (1983)

B. Taking a Position that *Roth* and *Sindermann* Fall Short of Yielding Due Process

Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 SO. CALIF. L. REV. 355 (1978)

Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 TEX. L. REV. 875 (1982)

Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 BOSTON U. L. REV 885 (1981)

Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS

(Pennick and Chapman ed.), NOMOS XVIII 126 (1977)

Monaghan, *Of "Liberty" and "Property"*, 62 CORN. L. REV. 401 (1977)

Rabin, *Job Security and Due Process: Monitoring Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1976)

Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978)

Terrell, *"Property", "Due Process," and the Distinction Between Definition and Theory in Legal Analysis*, 70 GEO. L. J. 861 (1982)

Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261

TRIBE, AMERICAN CONSTITUTIONAL LAW 501-563 (1978)

Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORN. L. REV. 445 (1977)

C. Taking a Position that *Roth* and *Sindermann* Afford More Process Than is Due

Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85

Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942 (1976)

Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEG. STUD. 3 (1983)

Office - Supreme Court, U.S.
FILED
DEC 16 1983
ALEXANDER L. STEVAS,

No. 83-87

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,
Petitioners,

v.

JESSE A. VAIL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

CHARLES S. SIMS
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, NY 10036
(212) 944-9800

MICHAEL H. GOTTESMAN *
ROBERT M. WEINBERG
PETER O. SHINEVAR
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	2
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. TERMINATION OF A PUBLIC SCHOOL TEACHER'S EMPLOYMENT IN MID-TERM OF A TWO-YEAR CONTRACT IS A DEPRIVATION OF THE TEACHER'S PROPERTY INTEREST	6
II. THE DUE PROCESS CLAUSE REQUIRES THAT A PUBLIC SCHOOL TEACHER BE AFFORDED NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE THE TEACHER IS DEPRIVED OF HIS PROPERTY INTEREST IN CONTINUED EMPLOYMENT	13
CONCLUSION	18

TABLE OF AUTHORITIES

Cases Page

Allen v. Autauga County Board of Education, 685 F.2d 1302 (CA11 1982) 15
Armstrong v. Manzo, 380 U.S. 545 (1965) 17
Arnett v. Kennedy, 416 U.S. 134 (1974) 4, 11, 16, 17
Barry v. Barchi, 443 U.S. 55 (1979) 16, 17
Bell v. Burson, 402 U.S. 535 (1971) 17
Bessler v. Board of Education, 69 Ill. 2d 191, 370 N.E. 2d 1050 (1977) 14-15
Bishop v. Wood, 426 U.S. 341 (1976) 4, 13
Board of Regents v. Roth, 408 U.S. 564 (1972) 4, 17
Boddie v. Connecticut, 401 U.S. 371 (1971) 17
Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915) 17
Connell v. Higginbotham, 403 U.S. 207 (1971) 4
Fuentes v. Shevin, 407 U.S. 67 (1972) 12
Goss v. Lopez, 419 U.S. 565 (1975) 4
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 6, 11, 12, 15, 16, 17
Mathews v. Eldridge, 424 U.S. 319 (1976) 17
Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) 12, 17
Miller v. Board of Education, 98 Ill. App. 2d 305, 240 N.E. 2d 471 (1968) 15
Morrissey v. Brewer, 408 U.S. 471 (1972) 18
Parratt v. Taylor, 451 U.S. 527 (1981) 6-7
Perry v. Sindermann, 408 U.S. 593 (1972) 4
School Directors v. Reddick, 77 Ill. 628 (1875) 14
Vail v. Board of Education, 706 F.2d 1435 (CA7 1983) .....*passim*
Vitek v. Jones, 445 U.S. 480 (1980) 11
Wisconsin v. Constantineau, 400 U.S. 433 (1971) 10

Constitution and Statutes

Constitution of the United States, Fourteenth Amendment .....*passim*
Civil Rights Act of 1871, 42 U.S.C. § 1983 3

TABLE OF AUTHORITIES—Continued

Miscellaneous Page

Annot., *Elements and Measure of Damages in Action by Schoolteacher for Wrongful Discharge*, 22 A.L.R. 3d 1047 (1968 & Supp. 1982) 15

Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972) 6-7

Chapman & Hutcheson, *Attrition from Teaching Careers*, 19 Am. Educ. Res. J. 93 (1982) 9

5A A. Corbin on Contracts § 1204 (1964) 14

Jantzen, *Why College Students Choose to Teach*, J. Tchr. Educ., March-April 1981, at 45-49 9

National Commission on Excellence in Education, *A Nation At Risk: The Imperative for Educational Reform* (April 1983) 9

National Education Association Research, *Prices, Budgets, Salaries, and Income* (Feb. 1983) 8

National Education Association Research, *Status of the American Public School Teacher: 1980-81* (1982) 9

Restatement (Second) of Contracts (1979)

§ 352 15

§ 353 15

§ 367 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-87

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,
Petitioners,

v.

JESSE A. VAIL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

This brief, *amici curiae*, is jointly filed by the National Education Association (NEA) and the American Civil Liberties Union (ACLU) with the consent of the parties, pursuant to the Rules of the Court.

INTEREST OF *AMICI CURIAE*

NEA is a nationwide employee organization, with a current membership of some 1.7 million members, the vast majority of whom are employed by public educational institutions. NEA operates through a network of affiliated organizations: it has as state affiliates an organization in each of the 50 States, the District of Columbia and Puerto Rico, and it has approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States. One of the principal purposes of NEA and its affiliates is to protect the constitutional rights of teachers, professors and other educational employees. Because the Court is being asked to decide issues of vital importance to the effective vindication of teachers' constitutional rights, NEA has a substantial interest in the outcome of this case.

ACLU is a nationwide, non-partisan organization of over 250,000 members dedicated to preserving the fundamental liberties secured by the Bill of Rights. In litigation throughout the country, ACLU and its affiliates frequently rely on the Due Process Clause to protect individuals against arbitrary or unjustifiable deprivations of property, a reliance that is threatened by the constricted view asserted in petitioner's brief of the protection that Clause affords.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, brought under 42 U.S.C. § 1983, presents the question whether—consistent with the Due Process Clause of the Fourteenth Amendment—a public school teacher who has a valid employment contract for a term may be summarily dismissed in mid-term of the contract, without any pre-dismissal notice of the purported reasons for the dismissal or opportunity to respond to those reasons. Applying controlling principles that this Court has established in its decisions, the District Court and the Court of Appeals concluded that the summary dismissal of respondent after only one year of a valid two-year employment contract deprived him of a property interest without due process. For that violation, respondent was awarded consequential damages.

In the Court of Appeals, Circuit Judge Posner dissented, saying that the result reached by the majority was a "trivialization of the Constitution," 706 F.2d at 1456, and that it could be avoided by re-thinking and limiting the principles that have underpinned this Court's due process jurisprudence. Unwilling to "submit with as good a grace as my brethren to the tyranny of the syllogism," Judge Posner suggested that "[w]e can break the chain of reasoning at any of three links." *Id.* at 1450. First, Judge Posner posited that an employment contract for a fixed term should not be considered a property interest within the meaning of the Fourteenth Amendment. *Id.* at 1450-1452. Second, he opined that even if an employment contract constitutes a property interest, respondent has not been deprived of that interest; as Illinois provides only monetary damages for the breach of an employment contract, the contracting employee has merely a "disjunctive right," entitling him either to employment or to contract damages, and as the Illinois courts had not "refused to pay [respondent] damages" for the breach of his employment contract, respond-

ent has not been deprived of his property interest. *Id.* at 1452-1453. Third, Judge Posner suggested that even if respondent's property interest were *not* "disjunctive," but rather an interest in continued employment as such (in which event there *would* have been a deprivation), respondent had not been denied due process because a post-termination lawsuit to recover money damages for breach of contract, available to him under Illinois law, is all the process that ought to be required by the Fourteenth Amendment for that deprivation.

We do not file this brief to demonstrate that this Court's prior decisions lead ineluctably to the decision reached by the majority below. That demonstration has been ably made in the concurring opinion of Judge Eschbach, 706 F.2d at 1441-49. Rather, we file this brief to address Judge Posner's dissenting opinion, and to show that this Court should not abandon established principles to follow any of the courses Judge Posner has charted. We do not linger over Judge Posner's first proposition—that an employment contract is not property—because as we show in the margin that premise is so fundamentally at war with the underpinnings of due process jurisprudence as to be unacceptable on its face.[1] We concen-

---

[1] "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). The Court has therefore recognized as property a public employee's "legitimate claim of entitlement to continued employment absent sufficient cause for discharge," *Goss* v. *Lopez*, 419 U.S. 565, 573 (1975), whether that claim arises from a statute or ordinance, e.g., *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), from "an explicit contractual provision," *Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972), or, as here, from "a clearly implied promise of continued employment." *Board of Regents* v. *Roth*, 408 U.S. at 577 (1972), *citing Connell* v. *Higginbotham*, 403 U.S. 207, 208 (1971); see also *Bishop* v. *Wood*, 426 U.S. 341, 344 (1976).

trate instead on Judge Posner's second and third points. In our view, both are irreparably flawed. Both stem from the mistaken premise that respondent derived no expectation from his employment contract beyond the monetary compensation he was entitled to receive under that contract. It is that premise which enables Judge Posner to see the contract as "disjunctive" (your job or your salary), and to see a post-termination lawsuit that can yield only the lost salary as constitutionally adequate process.[2]

As we show, salary represents only *part* of the benefit that a public school teacher expects to derive from his contract of employment; the non-monetary benefit of the contract—the opportunity to actually perform the job—constitutes a vitally important element of the consideration a teacher expects to receive as part of the bargain. Once that is recognized, the inadequacies of Judge Posner's second and third points become apparent: (1) a teacher's property interest in his employment contract cannot properly be considered a "disjunctive right" either to employment *or* salary; and (2) a post-termination contract action to recover the salary—which affords no opportunity to the teacher to seek retention of the promised work itself—is insufficient process when the State proposes to deprive the teacher of his entitlement to continued employment.

Judge Posner's suggested "break[s] [in] the chain of reasoning" cannot be reconciled with this Court's prior decisions—decisions which reflect the proper understanding of the concept of property protected by the Fourteenth Amendment and of the process that is due when the State proposes to deprive a person of such property.

---

[2] As explained *infra*, n.9, under Illinois law the only "damages" recoverable in a breach of contract action would be respondent's lost salary.

ARGUMENT

I. TERMINATION OF A PUBLIC SCHOOL TEACHER'S EMPLOYMENT IN MID-TERM OF A TWO-YEAR CONTRACT IS A DEPRIVATION OF THE TEACHER'S PROPERTY INTEREST.

Judge Posner posits that respondent's property interest in continued employment was only a "disjunctive right"—i.e., a right *either* to continued employment during the term of the contract *or* to damages if his employment were improperly terminated (damages that, under Illinois law, would consist solely of the promised salary, see n.9, *infra*). 706 F.2d at 1452-1453. On that hypothesis, the Board of Education's termination of respondent's employment was not a *deprivation* of his property interest, as the State (i.e., its courts) had not "refused to pay him damages" following the Board of Education's termination of his employment. *Id.* at 1452.[3]

---

[3] Judge Posner's conception of the disjunctive nature of respondent's property interest is based in large part on an article in the field of economic analysis of law. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972), *cited in* 706 F.2d at 1453. While Messrs. Calabresi's and Melamed's distinction between "property rules" and "liability rules" may be valuable for the economic analysis of legal principles, it is of little assistance to the present constitutional inquiry. As Calabresi and Melamed expressly concede, "most entitlements to most goods are mixed. Taney's house may be protected by a property rule in situations where Marshall wishes to purchase it, [and] by a liability rule where the government decides to take it by eminent domain." *Id.* at 1093.

But it makes no sense for purposes of the Due Process Clause to contend that the same tangible thing or intangible interest is "property" at some times and "not property" at others. Indeed, in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), even though the Illinois Supreme Court would have protected the plaintiff's fair employment cause of action only with a "liability rule" (a separate tort action for damages), *id.* at 427-428, 435, this Court concluded that the fair employment cause of action was a property interest, *id.* at 428-432. Similarly, in *Parratt* v. *Taylor*, 451 U.S. 527, 536 (1981), the Court did not doubt that Taylor's hobbykit was "property," even though the State only protected the hobbykit (under

Judge Posner's suggestion, however, misconceives the promise that was made to respondent, and the legitimate expectations that respondent derived from the contract that incorporated that promise.

As a factual matter, the Board of Education did not promise respondent a disjunctive right to employment *or* salary. Rather, the District Court found that the Board of Education had "assure[d] the respondent of *two years in his position*," App. 43 (emphasis added), i.e., that respondent "had *a commitment for two years of employment* by the defendant School Board." App. 48 (emphasis added); see also 706 F.2d at 1446 (Eschbach, J., concurring). And this assurance of two years in the position was worth far more to respondent than a simple assurance of two years' salary.

In many categories of public service money is not the principal attraction. Federal judges, for example, could earn far more in the private practice of law; they choose to be judges because of the non-monetary rewards afforded by this form of public service. They would not deem their expectations satisfied if they were paid judicial salaries but denied the opportunity to perform judicial work. The same point could be made with respect to prosecutors, policemen, social workers, and many other public employees.

Similarly, individuals who accept the joys and burdens of teaching do so for reasons other than money. The salary typically paid to a public school teacher is only a fraction of what that individual could earn if he took a job in another field requiring equivalent education and

---

Calabresi's and Melamed's analysis) with a "liability rule." The contested issue in *Parratt* v. *Taylor* was not whether the hobby-kit was "property," but whether the State-law remedy for its deprivation provided "due process." That same issue—whether or not a State-law remedy provides due process for the deprivation of a property interest—ultimately arises in this case as well (see Part II, *infra*), but that issue cannot be avoided by pretending that respondent has not lost a property interest.

training. For example, in 1981-82, the average starting salary for a public school teacher with a Bachelor's Degree was $12,769. In contrast, the average starting salaries in other fields for those with Bachelor's Degrees were substantially higher. National Education Association Research, *Prices, Budgets, Salaries, and Income* 22, Table 20 (February 1983).[4]

It is evident that individuals who choose to become teachers are prepared to accept this substantial earnings disadvantage because of the non-monetary rewards they expect to derive from teaching. A 1981 survey of American public school teachers found that the three principal reasons why individuals opt for teaching are their "desire to work with young people" (expressed by 69.6% of survey respondents), their "interest in a subject-matter field" (44.1%), and their belief in "the value or sig-

---

[4] AVERAGE STARTING SALARIES OF PUBLIC SCHOOL TEACHERS COMPARED WITH SALARIES IN PRIVATE INDUSTRY, 1975-76 TO 1981-82.

Position or subject field	1975-76	1978-79	1981-82
Minimum mean salary for teachers with a bachelor's degree	$ 8,768	$10,138	$12,769
College graduates with a bachelor's degree			
Engineering	13,236	17,172	22,368
Accounting	11,712	13,992	16,980
Sales—marketing	11,220	12,420	17,220
Business administration	9,948	12,516	16,200
Liberal arts	9,696	11,952	15,444
Chemistry	11,640	15,036	19,536
Mathematics—statistics	11,004	13,872	18,600
Economics—finance	10,404	12,408	16,884
Computer sciences	No Data	14,400	20,364
Other fields	10,956	13,560	20,028

Ibid. Over at least the last seven years (the period for which data are readily available), starting salaries for teachers have not only been lower, but have also increased at a lower rate than the starting salaries for other professions. *Ibid.*

nificance of education in society" (40.2%). In contrast, the "financial rewards" of teaching were mentioned by only 4.9% of those surveyed. National Education Association Research, *Status of the American Public School Teacher: 1980-81*, at 71-73, 239-242 (1982). Accord, Jantzen, *Why College Students Choose to Teach*, J. Tchr. Educ., March-April 1981, at 47-48; Chapman & Hutcheson, *Attrition from Teaching Careers*, 19 Am. Educ. Res. J. 93 (1982); National Commission on Excellence in Education, *A Nation At Risk: The Imperative for Education Reform* 15 (April 1983) (recognizing "the dedication, against all odds, that keeps teachers serving in schools and colleges, even as the rewards diminish").[5]

The facts of this case illustrate the point. In entering into a two-year employment contract with the Board of Education, respondent "left Joliet where he and his family had lived for thirteen years, left a job he had held for ten years, and even *took a salary cut to take the job* in Paris." 706 F.2d at 1440 (emphasis added). Plainly, respondent only accepted the job as athletic director and head football coach in the Paris Union School District because that job offered him some other, non-monetary rewards in addition to its (lower) salary. Thus, respondent's contract with the Board of Education for two years of employment gave him more than an assurance of monetary compensation; it promised him the non-monetary benefits of a job he wanted to perform over at least the two-year contract period.

In entering into this contract, respondent thus expected to receive a two-year opportunity to perform work that he especially enjoyed doing—work that he was prepared

---

[5] Chapman and Hutcheson compared the personal characteristics of individuals who left the teaching profession with those who remained in teaching. Based on that evaluation, Chapman and Hutcheson concluded: "Criteria for success widely valued in other fields, for example, salary and job autonomy, appear to have less relevance for teachers." 19 Am. Educ. Res. J. at 104.

to do at a salary lower than he was already receiving in his prior job. But respondent had yet another expectation from that contract. Its two-year term gave respondent an extended opportunity to prove his worth to the Board of Education by "correct[ing] the deficiencies that then existed in the Paris School District's athletic program," App. 44, and in that manner to convince the Board by successful performance that he was worthy of tenure. "Had Vail been successful in rebuilding the school's athletic program, as no doubt all parties hopefully anticipated, Vail would have benefited after two years from *statutory tenure*," 706 F.2d at 1438 (emphasis added). It was thus a significant part of the bargain, from respondent's standpoint, that the Board assure him two years' employment. App. 44-45. By taking from respondent half the period that he had been promised, the Board deprived him of one of the most valuable expectations that had induced him to enter into the contract—an extended period to demonstrate his worthiness for tenure.[6]

It would, of course, be possible for a State to create a property interest that would take a disjunctive form. For example, a Board of Education could offer a teacher an option contract for his services, under which the Board promises *either* to employ the teacher at an agreed-upon

---

[6] Dismissal of a public school teacher, such as respondent, during the term of an employment contract adversely affects the teacher's future employment prospects with other school districts as well. Unlike an untenured teacher who is denied renewal at the end of a contract term or an employee who is dismissed from a job that is terminable at will—both of whom may be properly dismissed for reasons wholly unrelated to their job performance—the arbitrary dismissal of a teacher *during* his contract term automatically carries an inference of "cause" for the teacher's dismissal. Thus, a mid-contract dismissal necessarily impugns the teacher's "good name, reputation, honor, [and] integrity" in the professional community, *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971), and can be expected to create substantial, practical difficulties in the teacher's search for future employment.

salary *or*, if it chooses not to employ him, to pay him the salary. But such a disjunctive entitlement is not the norm, and it is not the property interest promised in this case.[7] Respondent had a simple property interest in continued employment, not a disjunctive claim of entitlement to employment *or* salary.

Judge Posner's notion that respondent's property interest is a "disjunctive right" thus is not an accurate depiction of *either* party's expectations when the contract here was negotiated. Rather, his notion reduces to the premise that as the State-prescribed *remedies* for breach of contract are limited (and yield less for the teacher than the Board's promised compliance with the contract would provide) the respondent's property interest should be redefined *as a matter of law* to consist of no more than what the State furnishes as a remedy for breach of the contract. Thus restated, Judge Posner's position is merely a reincarnation of the thesis that "property" is defined for Fourteenth Amendment due process purposes not by the entitlement the State has provided but by the consequences the State attaches to the deprivation of that entitlement—a thesis which a majority of this Court has dispositively laid to rest. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 431-432 (1982); *Vitek* v. *Jones*, 445 U.S. 480, 490-491 & n.6 (1980); *Arnett* v. *Kennedy*, 416 U.S. at 166-167 (Powell, J., concurring); *id.* at 185 (White, J., concurring in part and dissenting in part); *id.* at 211 (Marshall, J., dissenting).

As the cited cases demonstrate, this Court has never measured the property interests protected under the Due Process Clause by the yardstick of remedies afforded under State law. It has never treated property interests as "disjunctive rights," consisting of *either* the enjoyment of the legitimate claim of entitlement *or* the remedy for

[7] The clearest evidence that the contract here was not disjunctive in this sense is that after firing respondent the Board refused to pay his salary.

the entitlement's deprivation that the State has elected to provide. For example, in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), the plaintiff had been deprived (through the negligence of a State official) of a fair employment cause of action under State law. The State furnished a tort remedy for that negligence. *Id.* at 435. But the *Logan* Court held that the plaintiff had been deprived of a property interest without due process. In reaching that result, the Court defined the property interest as the fair employment cause of action, *id.* at 428-432, *not* as a "disjunctive right" to either the fair employment cause of action *or* a tort remedy under State law for negligent deprivation of that cause of action. The availability of the tort remedy for monetary damages did not negate the conclusion that the plaintiff had been deprived of his property interest. See *id.* at 435-437. Similarly, in *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1 (1978), the Court held that the plaintiffs had a property interest in continued utility service, *id.* at 11-12, *not* a disjunctive right either to that continued utility service *or* to the State law remedies for its discontinuance (a post-termination suit for damages or a post-payment action for a refund). The availability of State-law remedies for wrongful deprivation of utility service thus did not mean that termination of the service was not a deprivation of the plaintiff's property interest. See *id.* at 19-20. See also, e.g., *Fuentes* v. *Shevin*, 407 U.S. 67, 80-82 (1972).

Judge Posner's notion regarding the disjunctive nature of property interests thus is at war with this Court's prior decisions defining the scope of Fourteenth Amendment property interests. Indeed, that notion would effectively nullify the whole concept of procedural due process for property interests, and reduce this aspect of the Fourteenth Amendment to a redundancy. For wherever the State provides a means for remedying the deprivation of property, that State means would become the "disjunctive" definition of the property interest; and

wherever the State provides *no* means to enforce a "claim of entitlement," that claim would be merely hortatory and not property within the meaning of the Fourteenth Amendment. *Bishop* v. *Wood*, 426 U.S. 341, 347 (1976). As we have shown, that incongruous result has been foresworn by this Court.

II. THE DUE PROCESS CLAUSE REQUIRES THAT A PUBLIC SCHOOL TEACHER BE AFFORDED NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE THE TEACHER IS DEPRIVED OF HIS PROPERTY INTEREST IN CONTINUED EMPLOYMENT.

In the present case, the Board of Education terminated respondent's employment after only one year of his two-year contract. Prior to that termination, as the District Court found, respondent "was not given any reason for his termination, nor was he afforded a hearing in which he could reply to any purported cause for his termination." App. 45. Because the Board of Education provided respondent with no notice or hearing, this case does not present the question of what precise procedures are due a public school teacher before his property interest in continued employment is terminated. Rather, this case presents the simple question of whether *any* pre-termination process is due a public school teacher in these circumstances.

The District Court and the Court of Appeals concluded, in light of this Court's decisions, that notice and some opportunity to be heard are constitutionally required before a public school teacher who has a property interest in continued employment is dismissed. Judge Posner, however, as his third proposition, suggested that a post-termination action for damages, by itself, provides the full measure of procedural protection that the Due Process Clause ought to require.

Again, this suggestion is founded on the incorrect premise that respondent's property interest may be defined as no more than the salary to which he was entitled. See 706 F.2d at 1454. For only if respondent's interest in the Board's performance of the contract were limited to the receipt of the promised salary might an action for lost salary provide a process commensurate with the deprivation of property for which that process is required. Once it is recognized that respondent's property interest includes the opportunity to perform the job—a remedy not obtainable from the contract action—it is apparent that that action, by itself, does not protect the full measure of respondent's property interest and thus cannot constitute the full measure of the process that is due.

All parties agree that a public school teacher, like respondent, who is summarily terminated by a Board of Education during the term of his employment contract could file a State-law action for breach of contract. The teacher would prevail in that action if he succeeded in showing that there was not "good cause" for the Board of Education's termination of his contract. But in Illinois, as in almost all jurisdictions, a public school teacher who prevailed in a contract action would recover only his lost salary; a court would not order specific performance of the employment contract, nor even a monetary equivalent (inadequate as that would be) for the less tangible but important non-monetary interests that the teacher would have lost by reason of the breach. *Bessler* v. *Board of Education*, 69 Ill. 2d 191, 370 N.E. 2d 1050, 1053-1054 (1977); *School Directors* v. *Reddick*, 77 Ill. 628 (1875); 5A A. Corbin on Contracts § 1204 (1964); Restatement (Second) on Contracts § 367 (1979).[9]

---

[9] In Illinois, as in most jurisdictions, a wrongfully discharged teacher's recovery is limited to the salary promised in the teacher's contract. "The appropriate remedy for the wrongful discharge of a

As we have shown, a teacher's interest in continued employment under an employment contract is not limited to an interest in the financial remuneration provided under that contract. The non-monetary rewards of teaching are not amenable to expression in dollars and cents, and are not recoverable under Illinois law, but that does not mean that their loss is any less real. As one Court of Appeals stated in a case involving a teacher's improper dismissal:

> When a person loses his job, it is at best disingenuous to say that money damages suffice to make that person whole. The psychological benefits of work are intangible, yet they are real and cannot be ignored. [*Allen* v. *Autauga County Board of Education*, 685 F.2d 1302, 1306 (CA11 1982)].

Thus, "[s]eeking redress through a [contract action] . . will never make the [teacher] whole," for the simple reason that the contract action "does not provide for reinstatement." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. at 436-437.

Only a process that affords the teacher an opportunity to *prevent* the loss of the job can be commensurate with

---

nontenured teacher is an action for breach of contract. The measure of damages is the salary provided in the contract reduced by such sums as the wrongfully discharged teacher has earned or by reasonable diligence could have earned in other employment subsequent to the discharge." *Bessler* v. *Board of Educ.*, 370 N.E. 2d at 1053-1054 (citations omitted). See generally Annot., *Elements and Measure of Damages in Action by Schoolteacher for Wrongful Discharge*, 22 A.L.R. 3d 1047 (1968 & Supp. 1982), and cases cited therein. That courts do not award monetary damages for loss of the intangible but real benefits that we have described in this brief is a reflection of the general principle that damages will not be awarded in contract actions for losses that cannot be measured with reasonable certainty. Restatement (Second) of Contracts § 352 (1979); see also *id.* § 353 comment a, illustration 1; *Miller* v. *Board of Educ.*, 98 Ill. App. 2d 305, 240 N.E. 2d 471, 475 (1968) (damages to teacher's professional reputation not recoverable).

the interest that due process is supposed to protect. Only through pre-termination notice and an opportunity to be heard can a teacher learn the reasons why the Board of Education is contemplating his discharge and respond to those reasons at a time when the teacher, who would otherwise be wrongfully discharged, might avoid losing his job.[10]

---

[10] Even if (unlike here) *post*-termination process were available that could lead to reinstatement, that process could not make the teacher entirely whole—non-monetary benefits would have been lost in the interim that could never be recovered. Absent State interests that would justify postponing process until after the deprivation has been visited, due process requires that pre-deprivation process be provided. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. at 436, and cases cited thereat. That notice and an opportunity to be heard are required *before* the deprivation of a property interest in continued employment, even where (unlike here) a post-deprivation procedure is available which can place an individual back in the position he initially held, is implicit in the Court's prior decisions. For example, in *Arnett* v. *Kennedy*, Justice Powell in his concurring opinion noted the extensive procedural protections that federal employees were afforded before removal. The procedures included "advance written notice of the reasons for [the] proposed discharge," "the right to respond to the charges both orally and in writing," and "an opportunity to appear personally before the official having the authority to make or recommend the final decision." 416 U.S. at 170. Justice Powell concluded that these procedures "comport[ed] with due process" as their use "minimize[d] the risk of error in the initial removal decision." *Id.* at 170-171. See also *id.* at 195-196 (White, J., concurring in part and dissenting in part).

Similarly, in *Barry* v. *Barchi*, 443 U.S. 55 (1979), the Court upheld the sufficiency of the procedures afforded a horse trainer before an interim suspension of his license, noting that well before his suspension the trainer had been notified of the reason for his proposed suspension and "was given more than one opportunity to present his side of the story to the State's investigators." *Id.* at 65. These pre-suspension procedures were thus sufficient to "satisfactorily establish[] probable cause to believe that a horse ha[d] been drugged and that [the] trainer ha[d] been at least negligent in connection with the drugging." *Id.* at 64.

Pre-termination notice and an opportunity to be heard, therefore, serve not only a useful but a necessary function here. Cf. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). Such pre-termination process is required in a case such as this to do more than "minimize the risk of error in the initial removal decision," *Arnett* v. *Kennedy*, 416 U.S. at 170 (Powell, J., concurring), or "establish probable cause" for an interim suspension, *Barry* v. *Barchi*, 443 U.S. 55, 64 (1979). Pre-termination notice and an opportunity to be heard are required if there is to be any process, at any time, which can prevent an unfounded or arbitrary deprivation of a public school teacher's property interest in continued employment. Certainly, if the only process available under state law is, as here, "a lengthy . . . process which . . . will never make the [discharged teacher] entirely whole," *Logan* v. *Zimmerman Brush Co.*, 455 U.S. at 437, then the absence of any pre-termination process denies the teacher "[a] fundamental requirement of due process"—"the opportunity to be heard . . . at a meaningful time and in a meaningful manner" in an effort to avoid deprivation of the opportunity to teach which was promised in the teacher's contract. *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

The circumstances of this case therefore present no occasion to make an exception to "the root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original; footnote omitted); accord, e.g., *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. at 19; *Board of Regents* v. *Roth*, 408 U.S. at 569-70 & n.7; *Bell* v. *Burson*, 402 U.S. 535, 542 (1971); *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 423 (1915). The District Court and the Court of Appeals correctly decided that, by its failure to give respondent any reason for his dismissal or any opportunity to respond to the purported

reasons before his dismissal, the Board of Education denied respondent due process of law.[11]

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

CHARLES S. SIMS
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, NY 10036
(212) 944-9800

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
PETER O. SHINEVAR
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

[11] To be sure, even if respondent had been afforded pre-termination process he might have failed to deflect the Board from its anticipated breach of contract, and in that event respondent would have been left with no more than his State-law breach of contract action. But that the Board might have proceeded with its contemplated breach even after affording respondent an opportunity to be heard does not mean either that the opportunity was meaningless or that its absence comports with due process. *Something*—whether or not amounting to "cause"—prompted the Board to terminate respondent's employment. If apprised of what that "something" was, respondent might have convinced the Board that it was factually incorrect or an unwarranted basis for dismissal. For these very reasons, due process is required even where the State retains ultimate discretion to abrogate an individual's interest. *Morrissey* v. *Brewer*, 408 U.S. 471, 483-484, 487-488 (1972).

No. 83-87

Office - Supreme Court
FILED
NOV 17 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

Board of Education of Paris Union School District No. 95, Terrance C. Parks, Charles R. Fox and Bernie Rinehart,

Petitioners,

v.

Jesse A. Vail,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

GWENDOLYN H. GREGORY
Counsel of Record

Deputy Legal Counsel
National School Boards Association
1055 Thomas Jefferson Street, N.W., #600
Washington, D.C. 20007
(202)337-7666

AUGUST W. STEINHILBER
Associate Executive Director
and Legal Counsel
National School Boards Association

THOMAS A. SHANNON
Executive Director
National School Boards Association

No. 83-87

IN THE
Supreme Court of the United States
October Term, 1983

Board of Education of Paris Union School District No. 95, Terrance C. Parks, Charles R. Fox and Bernie Rinehart,
Petitioners,

v.

Jesse A. Vail,
Respondent.

CONSENT TO FILING

Counsel for Petitioners and for Respondent have consented by telephone to the filing of the within brief by National School Boards Association. The letters confirming that consent are in the mail and will be submitted to the Court as soon as they are received.

Gwendolyn H. Gregory
Deputy Legal Counsel
National School Boards Association
1055 Thomas Jefferson, N.W.
Suite 600
Washington, D.C.

TABLE OF CONTENTS

CASES

Page

Interest of Amicus 1

Issue Presented for Review 2

Argument

Introduction 3

Is there a property right to be protected? 4

What process is Due? 9

Conclusion 23

Appendix A 24

Statutory Requirements of Teacher Contract Laws: A Comparison of the 50 States' Continuing Contract and Teacher Tenure Laws

TABLE OF AUTHORITIES

Page

CASES:

Armstrong v. Mango, 380 U.S. 545 (1965) 13

Bishop v. Wood, 426 U.S. 341 (1976) 12,13

Goldberg v. Kelly, 397 U.S. 254 (1970) . 17,18,19

Hostrop v. Board of Junior College District No. 515, 471 F.2d 488 (7th Cir. 1972) 3

Ingraham v. Wright, 430 U.S. 651 (1972) 23

Logan v. Zimmerman, 102 S. Ct. 1148 (1982) 14,15,21

Mathews v. Eldridge, 424 U.S. 319 (1976) 10

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) 19,20

Paul v. Davis 424 U.S. 693(1976) 12,15,16

Perry v. Sinderman 408 U.S. 601 (1972) 10,11,12,13

Regents v. Roth, 408 U.S. 564 1972) 8.10,11,12,13

Roe v. Wade, 410 U.S. 113 (1973) 15

Vail v. Board of Education, ___ F.2d ___ (7th Cir. April 19, 1983) slip op. 82-1202 20,22

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 20

OTHER AUTHORITIES

Corbin on Contracts 11

No. 83-87

IN THE

Supreme Court of the United States

October Term, 1983

Board of Education of Paris Union School District No. 95, Terrance C. Parks, Charles R. Fox and Bernie Rinehart,
Petitioners,

v.

Jesse A. Vail,
Respondent.

AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS

Amicus curiae, National School Boards Association, is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. It is organized to promote the general advancement of education and to encourage the most efficient and effective organization and administration of the public schools.

Established in 1940, the National School Boards Association is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

If the decision of the court below is affirmed, it will subject each school board to the burdensome task of providing a due process procedure before non-renewing probationary employees even though adequate state procedures exist to remedy any wrongful action by the school board.

ISSUE PRESENTED FOR REVIEW

If adequate state "common law" or statutory procedures exist to remedy an alleged breach of contract, does a public employee have an independent right to seek redress in the federal courts pursuant to the due process clause of the fourteenth amendment of the United States Constitution?

ARGUMENT

Introduction

A statement in the concurring opinion of Circuit Judge Eschbach below evidences the prevalent misunderstanding of circuit courts as to the purpose and meaning of the due process clause of the fourteenth amendment to the United States Constitution.

Judge Eschbach attempts to distinguish between federal and state "interests" in cases such as the one at bar, slip op. at page 25, through a quotation from a Seventh Circuit opinion, Hostrop v. Board of Junior College District No. 515, 471 F.2d 488 (7th Cir. 1972):

> A civil rights action based on the deprivation of due process and a contract action to recover damages for a breach are independent remedies. The civil rights action based on deprivation of a property interest established by contract seeks vindication for the arbitrary manner in which the contract was breached.
>
> A "garden variety" contract action seeks damages only for the losses caused by the breach once it has occurred in any manner whatsoever. There will be occasions when one action will

> lie but the other will not, as when the state has grounds to break an employment contract, but does so by violating an employee's due process rights to notice and a hearing. 471 F.2d at 494 n.15.

How can school board members be expected to do their jobs when the guidance they receive from federal courts is in a form such as that quoted above? A breach is a breach is a breach. Either there is a contract right, under state law, or there is not. Nor does the state's jurisdiction end when a contract right is found, because if the state provides due process before the matter is finally resolved, no federal constitutional question will even arise.

Is there a property right to be protected?

The threshold question in any due process case is whether there is a "life, liberty or property" interest to be protected. Some federal rights are created by the Constitution and are inalienable and absolute, notwithstanding state laws. "Property" rights on other hand,

are not federal rights. Property rights, if granted by the states, are merely protected by the Constitution from an arbitrary taking by the state.

One basic flaw in the reasoning of the decision below is its assumption that a property right exists under Illinois law. Before any right to due process comes into play there must be a showing that the property right, in this case the right under the alleged "implied contract," exists. Apparently, there is a dispute here as to whether a "contract" action even exists under Illinois law, given the existence of very specific state statutory language on teacher tenure and the dispute as to the nature of assurances made to respondent.

Most state teacher contract laws define "tenure" as the right to continuation of employment from year-to-year and provide for certain notice and hearing rights where a district seeks to non-renew a tenured teacher. These laws also set forth when that tenure right arises. Under

every state tenure law, the right does not arise until the teacher has been employed for a stated period of time. Prior to that time the teacher is probationary, and the district can terminate the teacher at the end of each probationary year for any reason except those involving fundamental rights such as the first amendment. See Appendix A.

These days many school districts, which in the past have been in a position to give tenure to all of their probationary teachers, are no longer able to do so. This may be due to a variety of reasons such as decreasing enrollments, decreasing state and federal funding, failure of a property tax bond issue, or unforeseen massive expenditures. Yet, the probationary teachers who were not re-hired might argue that they had a reasonable "expectation" to continued employment because of the district's past custom of giving tenure to probationary teachers.

Further, if there is such an "implied contract" cause of action in Illinois, do the facts

in this case state such a cause of action? Surely those decisions should be made by state, not federal, courts.

The ruling below, if affirmed, will have broad ramifications for the management of school districts across the country. The ruling applies even where there is a factual dispute as to the existence of a contract. Thus, in order to comply with the order below, a school board would have to offer a notice and hearing to any employee who is non-renewed, even though the board made no representations to the employee which would give rise to an "implied contract" situation. Any time a school board, superintendent or other hiring official, non-renews or refuses to enter into a contract with an existing employee the board must provide reasons, notice and hearing to that employee in order to avoid a federal lawsuit. The cost and administrative burden are enormous.

Yet in the absence of such a hearing, how is the school board to defend itself from an action

in federal court that the employees' claim is a real "expectation" and not merely unilateral. Since in most cases of non-renewal there is no such "expectation," is it not more reasonable to allow employees who believe they have an "implied contract" to resort to state breach of contract remedies rather than putting the burden on the school board to conduct pre-termination hearings in every situation of non-renewal, just to avoid the possibility that an employee may allege an "implied contract?"

As stated by the Supreme Court in Regents v. Roth, 408 U.S. 564 (1972):

> "[P]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." The claimant "must have more than an abstract need or desire for [a benefit]. He must have more than a unilateral expectation of it. He must instead have a legitimate claim of entitlement to it."

Unfortunately, the court below has taken up

Justice Marshall's statement in Roth to the effect that "every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment." In other words the court, has put the burden on the employer to prove there is no federal claim.

It should not be the province of federal courts to make the initial decision as to whether a "contract" right exists. That duty lies with state courts.

What process is "due"?

Where it has been established that a contract right exists under state law, either because the parties admit to its existence or a state court has so ruled, the next issue to be addressed is whether due process procedures exist in the state to protect that right, and whether, in fact, such procedures have been followed.

The Constitution itself does not set forth

what process is "due" or whether that process must be afforded before or after the deprivation of the property. The general guiding principle in several Supreme Court cases is that "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Armstrong v. Mango, 380 U.S. 545 (1965), Mathews v. Eldridge, 424 U.S. 319 (1976); Parratt v. Taylor, 451 U.S. 527 (1981).

The purpose of the due process clause is to prevent substantial injustice and to assure that persons wrongfully deprived of their property are made whole. It was not designed to supplant the common or statutory law of each state, but rather, to protect state-created rights from an arbitrary and capricious taking by the state.

Both majority opinions below rely in great measure on Perry v. Sinderman 408 U.S. 601 (1972) and Regents v. Roth, 408 U.S. 564 (1972) to support their positions on both the "property" interest issue and the issue of what

process is "due." Perry and Roth, although certainly the leading cases on the issue of what is a "property" right, do not discuss the question of what process is "due".

In Regents v. Roth the Court held that, under the facts presented, the "expectancy" of employment was not sufficient to be raised to the level of a "property" right. Sinderman held that a "property" right may arise out of an "implied contract" but the case was remanded on the question of whether there was such a contract and whether it had been breached without due process. The Court in Sinderman cites Corbin on Contracts in support of its opinion that a contract may be implied by the conduct of the parties, regardless of the lack of a formal written contract or system of tenure. Thus, the Court did not create a new federal property right arising out of the custom of the parties. It merely relied on state common law to support its decision.

It should also be noted that the plaintiff

in Sinderman, although raising the due process clause as an alternative claim, relied primarily on a claim of a first amendment violation. In a situation where a complaint raises both first amendment and due process claims, it might be appropriate for a federal court to take jurisdiction over the case even though state remedies exist to deal with the due process claim. In the case at bar, however, no allegations are made that the school board violated any right other than some amorphous right to be free from an alleged breach of contract.

Contrary to Judge Eschbach's decision below, slip op. at 11, nothing in Roth or Sinderman precludes a finding for the school board in this case.

More directly in point on the issue of what process is "due" are three decisions of this Court, Bishop v. Wood, 426 U.S. 341 (1976), Parratt v. Taylor 451 U.S. 527 (1981), and Paul v. Davis 424 U.S. 693(1976). Bishop and Parratt both involved alleged deprivations

of "property" interests, with the Court holding that the state remedies in Bishop - breach of contract and in Parratt--tort remedy for conversion, met constitutional standards of due process.

In Bishop the Supreme Court upheld the district court's finding that the plaintiff policeman, although a "permanent" employee under local ordinance, nevertheless "held his position at the will and pleasure of the city." The lower court further held that the City Manager's determination "of the adequacy of the grounds for discharge is not subject to judicial review." The lower court here, however, dismisses that holding, relying instead on language following Sinderman and Roth to the effect that a person may have a "property" interest in an "implied contract."

The relevant portion of Bishop is laid out in a statement by Justice Stevens:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are

> made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs.

Justice Stevens goes on to suggest that federal courts must abstain in these cases because these civil wrongs, where they do not implicate inalienable rights such as those under the first amendment, "can best be corrected in other ways. The due process clause is not a guarantee against incorrect or ill-advised personnel decisions."

In Parratt the Court held that state tort remedies were sufficient to make the claimant whole, even though admittedly the state had deprived claimant, a prisoner in the state penitentiary, of his property by losing certain hobby materials.

The court below grants short shift to Parratt on the ground that the precedent set in that case was, in the court's opinion below, laid to rest by the High Court in its decision in Logan v. Zimmerman. That is incorrect.

The Supreme Court carefully distinguished Parratt from Zimmerman by stating that, unlike Parratt, Zimmerman dealt with an established state procedure that destroyed the "liberty" interest of the complainant without according him proper procedural safeguards. While there was unanimity in the result, given the established state policy and practice, there was great diversity in the rationale of the Zimmerman Court. Zimmerman in no way limits the clear ruling in Parratt.

Paul v. Davis, supra, is a "liberty" interest case in which the plaintiff claimed a deprivation of "liberty" in his good name as the result of defamation by a state employee acting under color of law. The Court deferred to the state courts, stating that the complaint raised a "classical claim for defamation actionable in the [state] courts."

Unlike "property" interests, "liberty" interests exist even in the absence of state law and may even supercede state law, e.g. Roe v.

Wade, 410 U.S. 113 (1973). Yet this Court, in Paul v. Davis, held that state common law remedies, where they exist, are sufficient to protect even these higher rights, without resort to the federal courts. It would appear, therefore, that if state common law remedies are sufficient to accord due process in a "liberty" case, they are certainly sufficient in a "property" interest case where the interest itself exists only because of state law.

Where there has been a prima facie case of the deprivation of a property right, the inquiry of the federal court should be two-fold. First, the court should examine whether there are state post-termination mechanisms which the employee can use to vindicate the wrongful deprivation. Just as the Court in Paul v. Davis, supra, found a "classic claim for defamation actionable in the courts of virtually every State" to be sufficient to assure due process, so here, a classic claim sounding in contract is actionable in Illinois and in most other states.

The second inquiry should be whether the state post-termination mechanisms are designed to make the employee whole, in the approximate fashion as would a pre-termination hearing.

This second inquiry was addressed in Goldberg v. Kelly, 397 U.S. 254 (1970). That case involved the question of whether a post-termination hearing was sufficient to assure due process to a welfare recipient who, without any hearing, was summarily removed from the rolls and refused further benefits. The Court held that welfare recipients comprise a very special category of governmental beneficiaries, "the crucial factor" in that case being that "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." The Court, in carving out this exception, however, made the careful distinction between welfare recipients and "virtually anyone else whose governmental entitlements are ended" including "the blacklisted government contractor

[and] the discharged government employee."

It is interesting to note that Justice Black's dissent in Goldberg accuses the majority of forbidding "any conduct that a majority of the Court believes 'unfair,' 'indecent' or 'shocking to their consciences.'" Unfortunately, that is exactly what the lower courts continue to do in their attempts to follow the general line of reasoning in the Supreme Court's due process cases.

Since the purpose of the due process clause is to assure that an employee does not permanently and wrongfully lose his property, it would seem that if the state assures that the property or its equivalent is returned intact - when wrongfully taken - that is all that can be expected of the state. If the claimant cannot be made whole through post-deprivation procedures, only then might there be cause to require a pre-deprivation hearing.

It is difficult to understand why, if a "property" right is established only through the

operation of state law, the state cannot also be the vehicle for assuring redress where that property right is wrongfully deprived. It should be understood at the outset that we are dealing here not with poor, uneducated welfare recipients, Goldberg v. Kelly, supra, nor with persons whose right to heat and light in their homes is left to the unfettered discretion of a faceless bureaucrat who apparently will not listen to their pleas, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978), nor with the possible deprivation of a fundamental right itself guaranteed by the U.S. Constitution, i.e., free speech, freedom from unreasonable search and seizure, etc. Instead, what we have here is two competent adults who have entered into an armslength agreement, one of whom may have breached that agreement. Though the employer may have overstepped the bounds of good management, to have the federal court step in to vindicate this alleged wrong on the basis of a perceived constitutional right is absurd.

It is interesting to note that on two occasions judges have accused their brethren of "trivializing" the Constitution. Memphis Light, Gas and Water Div. v. Craft, supra; dissent in Vail v. Board of Education, slip op. at 41. Is the danger of such "trivialization" not greater than the "danger" that a public employee may have to wait for a decision of a state court before approaching the federal court?

Dissenting judges in substantive due process cases have also urged what is, in effect, an exhaustion of remedies requirement so as to give state courts the chance to rule on the constitutionality of their own state laws. In Wisconsin v. Constantineau, 400 U.S. 433 (1971) Justice Blackman stated in dissent:

> "It is impossible for me to believe that the Supreme Court of Wisconsin would uphold any such boundless power over the lives and liberties of its citizens .... I realize that there are many cases where federal courts should not stay their hands to permit state courts to interpret state law .... Here, however, no state court appears to have passed on this Act at all, and a state decision might well apply the

> bond of other state law to require notice, hearing, and other necessary provisions to render the challenged Act constitutional."

In Logan v. Zimmerman, 102 S. Ct. 1148 (1982), involving both an equal protection question and a due process analysis, Justices Powell and Rehnquist, concurring in the judgement on equal protection grounds, raised a serious question as to the scope of the majority opinion with regard to the due process issue. In response to the majority opinion that "seeking redress through a tort suit is apt to be a lengthy and speculative process which in a situation like this one will never make the complainant entirely whole" Justice Powell noted that:

> "It is necessary for this Court to decide cases during almost every term on due process and equal protection grounds. Our opinions in these areas often are critized, with justice, as lacking consistency and clarity. Because these issues arise in varied settings, and opinions are written by each of nine justices, consistency of language is an ideal unlikely to be achieved. Yet, I suppose we would all agree - at least in theory - that unnecessarily broad statements of doc-

> trine frequently do more to confuse than to clarify our jurisprudence."

There is a constant argument, particularly in these times of reductions in force and tight budgets, between employees who claim some type of "implied contract" right and school boards who claim that all employees are "employees at will" and can be fired on a moment's notice. The employee who can prove the existence of a contract and its breach should be awarded money damages in the state courts. However, the Constitution should not be used as an instrument to solve every civil squabble between public officials and their employees.

Judge Eschbach suggests that:

> [I]f state officials want to avoid the federal courthouse, they need merely provide a meaningful predeprivation hearing. And finally, of course, the state may choose not to employ individuals for short, fixed terms; indeed, such contracts may be rather unusual for reasons having nothing to do with the hearing requirement imposed by the due process clause.

Not only is this suggestion impractical and a

blatant example of judicial policy-making, it is also inaccurate. All states provide for probationary periods before tenure is acquired. "Short, fixed term" contracts are not the exception, but the rule for all beginning teachers. See Appendix A.

CONCLUSION

The cases on due process over the past decade are confusing and leave much uncertainty. Yet, given the consequences of losing a federal case and the fact that students and teachers are "making a federal case" of every perceived wrong, school boards have been forced into a bureaucratic nightmare of writing and enforcing long, involved policies. "Imposing additional administrative safeguards might reduce the risk [of wrongful terminations] marginally, but would also entail a significant intrusion into an area of primary educational responsibility." **Ingraham v. Wright**, 430 U.S. 651 (1972). In addition, when the citizens of this country see

their Constitution "trivialized" to the point that the lower court has done, they begin to think of that great, flexible, enduring document as merely a "loophole" - an unfortunate and tragic result. We hope that in re-examining its earlier decisions, this Court will provide a massive infusion of common sense into this body of constitutional law.

Respectfully submitted

GWENDOLYN H. GREGORY
Counsel of Record

Deputy Legal Counsel
National School Boards Association
1055 Thomas Jefferson Street, N.W., #600
Washington, D.C. 20007
(202)337-7666

AUGUST W. STEINHILBER
Associate Executive Director
and Legal Counsel
National School Boards Association

THOMAS A. SHANNON
Executive Director
National School Boards Association

APPENDIX A

Each state has a provision in its respective teacher contract law setting forth the amount of time in position required to achieve tenure. Once tenure is achieved the laws create a property right which can only be taken through certain procedures, as specified in the statutes.

Following is a list of the times in position required by each state to attain tenure.[1]

THE LENGTH OF PROBATION FOR NONTENURED EMPLOYEES IS --

- A majority of the school year:

  South Carolina.

- One year:

  Mississippi (nonrenewal), Washington.

- Two years continuous employment in the school district:

  Alaska

- The first two years of the contract:

  Nebraska (Class I, II, III, VI districts).

---

[1]Compiled by Washington State Senate. See Statutory Requirements of Teacher Contract Laws: A Comparison of the 50 States' Continuing Contract and Teacher Tenure Laws. December, 1976. Staff Contact: Kris Van Gorkom, Senate Research Center.

- Two years:

  Illinois (districts, optional third year).

- Not to exceed two years:

  Maine, Maryland.

- Two consecutive years:

  Hawaii (may be expanded to five years).

- First two years of employment in the school district:

  Illinois (district, optional third year), Michigan (optional third year), Pennsylvania.

- First two consecutive years of employment in the school district:

  Iowa (optional third year), Minnesota (all other cities).

- Three years in the state, two years in the school district:

  Delaware.

- Three consecutive years:

  Alabama, Arizona, Colorado, Connecticut, Georgia, Idaho, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Rhode Island, Tennessee, West Virginia, Wisconsin (counties with over 500,000 population), Wyoming.

- First three consecutive years:

  Minnesota (first

- First three years:

Missouri (metropolitan districts).

- Three years consecutive:

  California, Massachusetts, Texas (optional fourth year), Wisconsin (Milwaukee).

- Three consecutive years plus reemployment:

  Nebraska (Class IV or V districts, optional additional two years probation), New Mexico.

- Three years for the right to a hearing:

  New Hampshire.

- Three years:

  Illinois (cities), Louisiana, Maine, Dakota, Tennessee, Virginia, West Virginia.

- Three out of five years in the school district:

  Florida (optional fourth), Ohio.

- Four consecutive years in the same school in the same school district:

  Kentucky.

- Five successive years plus reemployment:

  Indiana, Missouri (statewide).

LENGTH OF PROBATIONARY PERIOD FOR CONTINUING CONTRACT TEACHERS WHO TRANSFER TO A NEW SCHOOL DISTRICT:

- No probationary period:

  Florida (at board's option), Pennsylvania, Rhode Island (unless notified).

- One year:

  Kentucky (at board's option), Michigan (may be waived), (all other cities), Virginia (may be waived), Washington.

- Eighteen months:

  Connecticut.

- First two years of contract:

  Nebraska (Class I, II, III, VI district).

- Two years:

  Nevada, New York, North Carolina (may be waived).

- Two consecutive years employment in the school district:

  Iowa (optional third, may be waived), Kansas (may be waived).

- Two consecutive years plus reemployment:

  Alaska, Wyoming (may be waived).

- Three consecutive years plus reemployment with the school district:

  Alabama, Georgia (with the same school board), New Mexico.

- First three consecutive years of employment:

  Minnesota (first class cities).

- Three successive years under contract:

  Nebraska (Class IV and V district probation).

- State board may grant tenure to any teacher who has been continuously employed for thirty-six months or who has previously had tenure in that or any other school district:

  Colorado.

- Three years in the state, two years in the school district:

  Delaware

- Three years:

  California, Louisiana, Massachusetts (one year at board's option).

- Five consecutive years plus reemployment in a school district:

  Nevada, Missouri (statewide).

No. 83-87-CFX
Status: GRANTED

Title: Board of Education of Paris Unior School District No. 95, et al., Petitioners
v.
Jesse A. Vail

Docketed:
July 15, 1983

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Miller, Thomas R.

Counsel for respondent: Ansel, Marc J.

Entry	Date	Note	Proceedings and Orders
1	Jul 15 1983	G	Petition for writ of certiorari filed.
2	Aug 15 1983		Brief of respondent Jesse A. Vail in opposition filed.
3	Aug 17 1983		DISTRIBUTED. September 26, 1983
4	Oct 3 1983		Petition GRANTED.
			**********
5	Nov 17 1983		Brief amicus curiae of Natl. School Boards Assn. filed.
6	Nov 17 1983		Brief of petitioners Bd. of Ed., etc., et al. filed.
7	Nov 17 1983		Joint appendix filed.
8	Nov 25 1983		Record filed.
9	Nov 25 1983		Certified C. A. proceedings received.
10	Dec 1 1983		Record filed.
11	Dec 1 1983		Certified original record received.
12	Dec 17 1983		Brief of respondent Jesse A. Vail filed.
13	Dec 16 1983		Brief amicus curiae of Natl. Education Assn, et al. filed.
14	Dec 16 1983		Brief amicus curiae of American Assn. of University Professors filed.
15	Jan 9 1984		SET FOR ARGUMENT. Tuesday, February 28, 1984. (1st case)
16	Jan 18 1984		CIRCULATED.
17	Feb 17 1984	X	Reply brief of petitioner Bd. of Ed., etc., et al. filed.
18	Feb 28 1984		ARGUED.